No. 77-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS J. O'REILLY
1150 17th Street, N.W.
Washington, D.C. 20036
Counsel for United States Independent Telephone Association

Of Counsel:

CHADBOURNE, PARKE,
WHITESIDE & WOLFF
1150 17th Street, N.W.
Washington, D.C. 20036

September 16, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner United States Independent Telephone Association (USITA) [1] respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review the July 28, 1977 decision of that court in this case.

---

[1] United States Independent Telephone Association (USITA) is the national trade association of the approximately 1,600 "Independent" (not owned by or affiliated with the American Telephone & Telegraph Company) telephone companies in this nation, companies that serve over half the served geographical area of the country with over 28 million telephones and almost $23 billion in telephone plant.

JUDGMENT BELOW

The July 28, 1977 decision of the Court of Appeals, not yet officially reported, appears as Appendix A to the American Telephone & Telegraph Company (AT&T) petition for certiorari in this case.[2] The decision of the Federal Communications Commission (FCC), reversed and remanded by the court below, is reported at 60 FCC 2d 25 (1976), and appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on the same date as its opinion. Timely motions for stay of mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure, filed by USITA, AT&T, and FCC, were granted by order entered August 22, 1977.

This petition, filed within the 30-day period prescribed by Rule 41(b), invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that FCC authorizations to a new class of carriers to provide "specialized" common carrier communications services conferred unlimited authority to provide all common carrier services.

STATUTES INVOLVED

The pertinent provisions of the Communications Act involved in this case appear as Appendix C.

---

[2] To avoid burdening the Court with duplicative documents, petitioner USITA will herein adopt and refer to the AT&T Appendix as "Pet. App."

STATEMENT OF THE CASE

A. Before The Federal Communications Commission.

In 1969, after evidentiary hearing, FCC granted authorization to Microwave Communications, Inc. (MCI) to construct a microwave radio line between Chicago, Illinois and St. Louis, Missouri for the purpose of offering "specialized" private line common carrier communications services, represented to be not then offered by or available from existing common carriers.[3]

In 1970, having received a substantial number of applications for authority to construct microwave facilities for the rendition of "specialized" services, FCC elected to proceed by general rulemaking, rather than considering each of the pending applications on its individual merits. This proceeding culminated in the Commission's 1971 *Specialized Carriers* decision,[4] in which FCC found and determined, as a matter of general policy, that the public interest would be served by the creation of a new class of "specialized" carriers, whose applications would be routinely processed and approved under the new general policy, without requiring specific public interest findings in each case. Promulgation of this general policy essentially permitted open entry into "[t]he business . . . of providing specialized private or leased line communication services through a microwave transmission facility as distinguished from public exchange and long distance

---

[3] *MCI*, 18 FCC 2d 953 (1969); *recon. den.*, 21 FCC 2d 190 (1970).

[4] *Specialized Common Carriers*, 29 FCC 2d 870 (1971); *recon. den.* 31 FCC 2d 1106 (1971).

toll telephone service."[5] Numerous applications by MCI and other specialized carriers were granted under this general policy of open entry, and many microwave facilities were constructed and put in operation.

In 1975, allegedly pursuant to a 1974 tariff filing offering "metered use service," MCI began marketing a communications service it called "Execunet." With Execunet, a customer dials an ordinary exchange telephone call to an MCI facility, dials his customer code, and then dials the telephone company area code and telephone number of any telephone in any distant city served by MCI. On completion of the Execunet telephone call, the customer is billed a per-minute toll charge. Connection and monthly minimum charges are also involved in Execunet service.

After an exchange of correspondence among FCC, AT&T, and MCI, the FCC issued a letter order on July 2, 1975[6] finding Execunet to be not "specialized" but an unauthorized switched public message telephone service.[7] Following further proceedings before the Commission in 1976, including the filing of comments and reply comments and the holding of oral argument before the Commission *en banc*, the FCC issued an extensive opinion,[8] again finding Execunet to be beyond

[5] *Washington Utilities & Transportation Com.* v. *FCC*, 513 F.2d 1142, 1155 (9th Cir. 1975); *cert. den.* 423 U.S. 836 (1975).

[6] This order is Appendix B to the FCC's July 13, 1976 Order (60 FCC 2d 25; Pet. App. 70b-75b).

[7] MCI sought judicial review of the 1975 letter order, but the case was held in abeyance to afford the Commission an opportunity to consider MCI arguments first presented to the court.

[8] 60 FCC 2d 25 (1976); Pet. App. 1b-61b.

MCI's authorizations. Essential to the Commission's conclusion were its findings (1) that MCI had sought and had been granted authority to provide private line services only; and (2) that MCI's Execunet service had all of the essential characteristics of message telephone service, but none of the characteristics of private line service.

B. In the Court Below.

Although the MCI petition for review of the 1975 FCC letter order was held in abeyance, its motion for stay of that order was initially granted by the court below. Stay was subsequently modified to permit MCI to continue serving existing Execunet customers, but not to expand the service to new customers or new locations. The court below, in its July 28, 1977 decision, considered both the 1975 letter order and the 1976 in-depth opinion issued by the FCC.

The court below began its analysis of the FCC action by characterizing it as "represent[ing] a substantial departure from prior administrative practice."[9] In the court's view, FCC authorizations to provide common carrier communications services are necessarily unlimited unless expressly and affirmatively restricted, and FCC's power to restrict its grants is found exclusively in Section 214(c) of the Communications Act.[10]

The basic rationale of the lower court's opinion is found not in its text, but in the final two sentences of

[9] *Slip. op.*, p. 16; Pet. App. 16a.

[10] *Slip. op.*, pp. 24-28; Pet. App. 24a-28a. Section 214(c) (47 U.S.C. 214) empowers the FCC to grant certificates "as applied for" or in part, and to attach terms and conditions to its grants. Pet. App. 7c.

its footnote 59 [11] where, after reviewing decisions from other circuits involving the validity and scope of the FCC *Specialized Carriers* decision, the court below concludes:

> "*Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services. However, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c) as we explain in text." [12]

REASONS FOR GRANTING THE WRIT

In its ingenious and innovative opinion, the court below has:

1) rendered a decision in irreconcilable conflict with decisions of other circuits in specialized carrier proceedings;

2) overstepped the permissible bounds of judicial review; and

3) created a significant Federal question concerning the validity of thousands of FCC authorizations under what the Commission believed was long and well established FCC policy and practice.

I. There Is A Clear And Direct Conflict Between Circuits.

The FCC's *Specialized Carrier* decision has been the subject of exhaustive scrutiny by both the Ninth and

[11] *Slip. op.*, p. 27; Pet. App. 26a.

[12] *Ibid.*

the Third Circuits. In each case, the reviewing court experienced no difficulty in concluding that specialized carriers were authorized to offer private line services but were not authorized to provide plain old message telephone service. Thus the holding of the court below that specialized carriers are free to offer plain old message telephone service is in clear and direct conflict with at least the holdings of the other two circuits.

In *Washington Utilities & Transportation Commission* v. *FCC*,[13] at issue was the basic legality of the Commission's *Specialized Carrier* decision. Necessarily essential to resolution of that basic issue was the scope of the FCC's order establishing the new class of specialized carriers, and whether the Commission's conclusion that construction of facilities by the new carriers was required by the public convenience and necessity was adequately supported.

That the *Washington Commission* court fully and clearly understand the scope of the FCC order is readily apparent from its succinct definition of specialized services:

> "The business involved is that of providing *specialized private or leased line* communications services . . . *as distinguished from* public exchange and long distance toll telephone service" (emphasis supplied).[14]

Similarly clear and unambiguous is the court's analysis of the FCC's findings in support of the Commission's

[13] 513 F.2d 1142 (9th Cir. 1975); *cert. den.* 423 U.S. 836 (1975).

[14] 513 F.2d at 1155. That this distinction was widely understood by all concerned is evident from representations made to this Court in oppositions to petitions for certiorari in both the Ninth and the Third circuit cases. Pet. App. 125b-141b.

ultimate public convenience and necessity conclusion. Applying the standards established by this Court in *FCC* v. *RCA Communications Inc.*,[15] the Ninth Circuit upheld the Commission's findings that a public need and demand for *specialized* services existed, and that because of the small and limited portion of the communications market that would be opened to competition from the new class of *specialized* carriers, existing carriers would not be adversely affected. Inasmuch as the record before the Commission and the public interest findings before the court were clearly limited to *specialized* services, had the court considered the Commission's decision to purport to authorize all services, without limit, summary reversal would have been appropriate.

The scope of the FCC *Specialized Carrier* decision was subjected to even more detailed scrutiny by the Third Circuit in *Bell Telephone Company of Pennsylvania* v. *FCC*,[16] where the basic issue before the court was whether the furnishing of communication services known as "FX" (foreign exchange) and "CCSA" (common control switching arrangement) was within the authorization granted to *specialized* carriers. In rejecting the contention by telephone companies that provision of FX and CCSA services by the *specialized* carriers was an unwarranted enlargement of the scope of the Commission's *Specialized Carrier* decision, the *Bell Telephone* court, taking as its criterion the category of services classified as private line by the Commission, found FX and CCSA to be within the private line category and therefore authorized by

[15] 346 U.S. 86 (1953).

[16] 503 F.2d 1250 (3d Cir. 1974); *cert. den.*, 422 U.S. 1026 (1975).

the Commission's *Specialized Carrier* decision. Again here, as in the Ninth Circuit decision, the court found the Commission's analysis of the limited market impact of the new *specialized* carriers persuasive as to the scope of the authorizations granted.

The meticulous and thorough review by the Third Circuit of the parameters of private line service, and its conclusion that FX and CCSA services fell within those parameters, lend themselves to no other logical conclusion but that the category of private line services establishes the boundary beyond which *specialized* carriers are not authorized to operate. Were this not so, *i.e.*, had the *specialized* carriers authorizations included both private line and all other services (*e.g.*, message toll telephone), then the entire rationale of the Third Circuit decision and its meticulous delineation of the limited private line service category is unnecessary and without meaning.

Indeed, the Third Circuit's rejection of contentions that the FCC order before it on review was vague and overbroad is singularly enlightening on this point. According to the court, although the FCC order "on its face . . . gives little guidance as to the types of services that AT&T will be required to provide [to MCI] 'hereafter'" (503 F.2d at 1273), the court concluded that read in context, "the FCC has required AT&T to provide to the *specialized carriers those (interconnection) elements of private line services* which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department" (*Ibid.* at 1273-1274) (emphasis supplied).

Not only have the Ninth and Third Circuits had occasion to review the scope of the FCC's *Specialized*

Carrier decision, but so too has the District of Columbia Circuit itself. Only a year ago, in *AT&T* v. *FCC*,[17] the D.C. Circuit affirmed an FCC decision authorizing U.S. Transmission Systems (a subsidiary of International Telephone & Telegraph Co.) to construct a microwave system for the purpose of offering specialized services. Noting with approval both the Ninth and Third Circuit decisions, and specifically recognizing that the issue before both courts was the scope of the *Specialized Carriers* decision, the D.C. Circuit acknowledged the Commission's decision in *Specialized Carriers* to be "that the public interest, convenience and necessity would be served by permitting specialized common carriers to provide a full range of private line communications services. . . ."[18]

Given the in-depth analysis of *Specialized Carriers* by the Ninth and Third Circuits, and the D.C. Circuit's own iterated acknowledgment of what that decision authorized, the direct conflict among circuits is apparent. The footnote effort by the court below to avoid this clear conflict by asserting that the issues in other cases were different is patently erroneous; and with deference, the asserted inability to reason from the scope of the grant itself to its obvious limitation approaches sophism. It is quite clear that contrary to the court's impression that the Commission's Execunet decision represented a departure from prior admin-

[17] 539 F.2d 767 (D.C. Cir. 1976).

[18] 539 F.2d at 773-774. See also *Nader* v. *FCC*, 520 F.2d 182 (D.C. Cir. 1975) where the court (at 187) recognized that "MTS and WATS are essentially monopoly services . . . . AT&T's [other] interstate revenue accrues from private line service . . . . Unlike MTS and WATS, several specialized carriers, including MCI, compete with AT&T in this part of the market."

istrative practice, the Commission's decision here was wholly consistent with its own and with judicial construction of its *Specialized Carrier* decision since 1971.

II. The Court Below Overstepped The Bounds Of Judicial Review.

It is axiomatic that judicial review of agency action must be based on the agency's action and its rationale, not on what a reviewing court thinks the agency should have done or said.[19] Equally well settled is the corollary to this axiom, *i.e.*, that the reviewing court may not substitute its opinion as to what the agency decision should have been for what the agency itself decided.[20]

In the case below, however, the court's result-oriented decision has substituted its own judgment for that of the Commission, summarily discarded the Commission's rationale for its action, devised its own theory of what the agency should have done, and declined to accord even the normal deference to an agency's interpretation of its own decisions[21] simply because the FCC did not do or say what the court thought it should

[19] *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156, 169 (1972). *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

[20] *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

[21] *Slip op.*, p. 30, n.67; Pet. App. 29a; *cf. MCI Communications Corp.* v. *AT&T*, 496 F.2d 214 (3d Cir. 1974), where the court vacated a district court ruling ordering provision of AT&T facilities to MCI, pointing out that under the primary jurisdiction doctrine it was for FCC, not the court, to determine "exactly what private line services had been authorized by the FCC" (496 F.2d at 222). And as this Court concluded in *Chenery, supra,*

> "The Commission's conclusion here rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts" (332 U.S. at 209).

have done or said, or did not reach the result that the court below thought proper.

Underlying the court's novel approach to the FCC's Section 214 certification authority and its procedures, an approach original with the court, appears to be a new theory that all grants of certificates of public convenience and necessity by the Commission are and must be unlimited, unless affirmatively restricted. Curiously, the court below finds support for its theory not in what the Commission itself did or said in *Specialized Carriers,* but in its own selected excerpts from a Commission staff report in *Specialized Carriers,* which the Court erroneously construes as relating to services not before the Commission in that case.[22]

But as the court itself acknowledges, "We can assume, without deciding, that a service like Execunet was not within the contemplation of the Commission when it made the *Specialized Carrier* decision."[23] Adoption by the Commission of the staff report, adverted to by the court below,[24] itself demonstrates that the area of contemplation of both the Commission and its staff were identical, and that the staff comments selected by the court below necessarily related to the service offerings before the Commission in *Specialized Carriers,* not to some other undefined services not there considered.

Equally flawed are the efforts by the court below to find support for its conclusions in its own theories of the import of "instruments of authorization" and of the meaning of the Commission's nondecision in FCC Docket No. 19117, theories apparently underlying the

[22] *Slip op.*, p. 29; Pet. App. 28a.

[23] *Slip op.*, p. 27; Pet. App. 26a.

[24] *Slip op.*, p. 29, n.64; Pet. App. 28a.

court's conclusion that past Commission practice recognized the court's new affirmative restriction doctrine.[25]

Whatever the import of "instruments of authorization" at other times or in other services (the instrument itself is a preprinted form (FCC Form 462-B), on which little if anything other than radio specifications are typed or computer printed), it is clear beyond question here that the Commission itself, all parties to its proceedings, and the Ninth, Third and District of Columbia Circuits all considered the *Specialized Carrier* decision as having clearly established the limited parameters of all instruments of authorization issued pursuant to that decision. In short, specialized carriers were authorized to provide private line and only private line services.

With regard to FCC Docket No. 19117, what the court below appears to have overlooked is that the stated purpose of that proceeding was to equalize the competitive position of the new specialized entrants, who required certification, with that of the existing carriers having existing facilities. It is quite clear that the purpose of Docket No. 19117 was not to authorize specialized carriers to provide message toll telephone service, nor did termination of the Docket No. 19117 proceeding without decision have that result. Moreover, a nondecision can hardly be said to establish a pattern of prior administrative practice.

Thus it is clear that in substituting its own conclusion and constructing its own ingenious rationale in this case, the court below has not only exceeded all limits of judicial review, but its own conclusion and rationale are greviously in error.

[25] *Slip op.*, pp. 16-17, Pet. App. 16a.

III. The Decision Below Would Have Incredible Consequences.

If the court below is correct, the FCC has unwittingly created and issued thousands of authorizations to over 30 new telephone companies in the past seven years, in each case without the slightest attention to or consideration of whether the public interest, convenience and necessity require or would be served by its action. Indeed, the absence of a single public interest finding in support of the establishment of 30 new United States telephone companies would strongly suggest the invalidity of all of these authorizations, if indeed unlimited as the court below found.[26] Yet affirmance of these now judicially found to be unlimited grants, concededly without administrative or judicial consideration of the public interest,[27] is the result of the court's holding that absent specific affirmative action by the Commission prohibiting the offering of services not contemplated by the Commission and for which authority was not sought by the applicant, all grants are unlimited.

That there is something fundamentally wrong with this result, particularly in this case, is further evidenced by the fact that before, during, and after *Specialized Carriers*, MCI and other specialized carriers repeatedly and emphatically advised the Commission that the services for which they sought authorization were new, innovative, and not available from already existing carriers.[28] MCI itself, in fact, repeatedly as-

[26] That 30 new telephone companies serving this country are not required by the public interest, convenience and necessity is a matter worthy of judicial notice.

[27] *Slip. op.*, p. 32; Pet. App. 31a.

[28] Quite serious questions of misrepresentation are raised by the original assertion, on the basis of which the FCC general policy

sured the Commission and the courts that it did not seek to enter the switched voice service and provide long distance toll telephone service (MTS). As the Commission found,

> "According to MCI, the 'real distinction which delineates MCI service from anything provided today by existing common carriers is . . . the manner in which a customer may utilize it [MCI service] in order to provide a customized intra-company point-to-point communications system . . .'" (*Specialized Carriers, supra,* at 874).

Again, in its briefs in the original MCI case (18 FCC 2d 953 (1969)), MCI asserted in support of its requested authorization that "MCI will not provide a toll exchange telephone service." Again "MCI emphasizes that it is not seeking to become a public telephone exchange company" (*Ibid.*). And "MCI would

was adopted, that specialized carriers proposed to offer services not available from existing carriers (see *Specialized Carriers, supra*). Having secured authorization for the purpose of offering new specialized services, the specialized carriers next shifted to the assertion that they should be allowed to offer all private line services then available from existing carriers. This gambit having been successful (see *Bell Telephone, supra*), the specialized carriers now assert that they are authorized to provide plain old telephone service, a service neither new, nor not available from existing carriers, nor specialized, nor private line. Surely, after-thought expansion of authorization by ingenious advocacy does not and can not meet the standard of public interest, convenience and necessity prescribed by the Communications Act of 1934. And it is undisputed and indeed indisputable that the FCC has never found that the public interest requires the provision of plain old telephone service by specialized carriers. Thus, either the Commission is naive beyond belief, or it is the victim of serious misrepresentation by applicants for its authorizations. In either event, however, not even MCI claims affirmative authorization by the Commission to offer message toll telephone service.

not offer public telephone exchange services, that is, MCI customers would not use MCI facilities to call any member of the general public" (*Ibid.*) (Pet. App. 107b-110b).

Similar representations (or misrepresentations) were made to the courts that reviewed the *Specialized Carrier* decision (*supra,* n.14). Surely, the Commission (and the courts) are entitled to rely, as indeed they did [29] to substantial degree, on representations made by applicants; and when applications are granted "as applied for," [30] it approaches the absurd to require, as would the court below, that the Commission also affirmatively find a negative, with support in a nonexistent record, that it is not in the public interest to grant authority not only not requested but expressly disclaimed.

If the Commission is to carry out effectively and efficiently its affirmative statutory mandate, *i.e.,* "to make available . . . to all of the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate

[29] In the six years since the *Specialized Carrier* decision, the Commission has consistently and repeatedly expressed its conviction that it had authorized *specialized carriers* to provide *only* private line services. These expressions are found not only in its decisions, but in public utterances and in representations to the Congress (see, *e.g.,* Statement of FCC Chairman Wiley, House Hearings, 94th Cong., 1st Sess. 46, March 11, 1975—"the competition we have introduced has been in the private line and not the message toll service"). And as shown above, the private line only scope of *Specialized Carriers* has been recognized by the Ninth Circuit, twice by the Third Circuit, and twice by the District of Columbia Circuit. Thus if the Execunet case indeed involved a departure from past practice, the cornerstone of the opinion below, that departure was by MCI and the court below, not by FCC.

[30] Section 214(c); Pet. App. 7c.

facilities at reasonable charges," [31] the Commission must be able to make the affirmative finding required by its Section 214 on the basis of the application before it, *i.e.,* that the public convenience and necessity require the construction or operation of the applied for interstate facilities for the purposes designated by the applicant. To require, as would the court below, the development of a record covering all services not applied for, in support of a nonstatutory, negative public interest finding not only stands the statute on its head but is tantamount to a reversal of the Court's landmark decision in *RCA, supra,* for under that decision it is the Commission's charge to regulate entry, not non-entry, into the field of common carrier communications.

CONCLUSION

For the reasons assigned, a writ of certiorari should issue to the Court of Appeals for the District of Columbia Circuit, and this case set for plenary review.

Respectfully submitted,

THOMAS J. O'REILLY
1150 17th Street, N.W.
Washington, D.C. 20036

Counsel for United States Independent Telephone Association

Of Counsel:

CHADBOURNE, PARKE,
WHITESIDE & WOLFF
1150 17th Street, N.W.
Washington, D.C. 20036

[31] Communications Act, Sec. 1; 47 U.S.C. § 151.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Of Counsel:

JOHN R. WORTHINGTON
1150 - 17th Street, N.W.
Washington, D.C. 20036
(202) 872-1600

October, 1977

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES
RAYMOND C. FAY
HALEY, BADER & POTTS
1730 M Street, N.W.
Washington, D.C. 20036
(202) 331-0606

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421 and 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC.,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the Federal Communications Commission has authority to stop a specialized common carrier from providing a duly tariffed new communications service on previously certified lines without making any finding that the public interest so requires?

STATEMENT OF THE CASE

In the decision below, the lower court held that the FCC could not, without a finding of public interest, stop a specialized common carrier from providing to the public over previously certified lines a validly tariffed new communications service.

Petitions for certiorari were filed on September 16, 1977, or shortly thereafter, by the American Telephone and Telegraph Company ("AT&T"), the United States Independent Telephone Association ("USITA", an assocation of non-AT&T telephone companies which, under various arrangements, share revenue with AT&T) and the Federal Communications Commission (the "FCC" or the "Commission"). The United States of America, the other statutory respondent below, has declined to join these three parties in petitioning for certiorari.

MCI Telecommunications Corporation, Microwave Communications, Inc. and N-Triple-C Inc. (collectively, "MCI") are affiliated communications common carriers, operating a transcontinental system providing business and data long distance communications services among 37 metropolitan areas throughout the United States.

Background

In 1963, Microwave Communications, Inc. filed applications for authority to construct the first specialized common carrier microwave facilities between St. Louis and Chicago. The FCC ultimately granted these applications in 1969 after an extensive evidentiary hearing. Throughout these very protracted proceedings, AT&T maintained unrelenting opposition to the competition which would emerge by grant of the applications, alleging unsuccessfully that competition of this nature was, for various reasons, contrary to the public interest.[1]

[1] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1969), *reconsideration denied*, 21 FCC 2d 190 (1970).

After the *Microwave* decision, many additional potential competitors to AT&T filed numerous applications for routes encompassing virtually all of the major business communities in the United States. The FCC, instead of addressing each set of applications on an individual basis, first initiated a broadly based rule-making proceeding to consider certain questions common to all these applications, including the question of whether permitting the entry of new competitors would be in the public interest. *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission's Rules* (Docket No. 18920), 29 FCC 2d 870 (1971), *reconsideration denied*, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

The Commission's order instituting the *Specialized Carrier* proceeding provided that, once the specifically enumerated policy questions had been answered, it would "consider each proposal on its individual merits and follow such procedures as may be necessary to resolve any remaining questions pertinent to the particular set of applications." 24 FCC 2d 318, 327 (1970). The FCC also invited the parties to suggest additional questions for consideration in the rulemaking proceeding. The proceeding resulted in the adoption by the FCC of a general policy encouraging the competitive entry of new carriers in the intercity business and data communications field.[2]

One objective stressed by the Commission in reaching its *Specialized Carrier* decision was to "provide users with flexibility and a wider range of choices as to how they may best satisfy their expanding and changing re-

[2] 29 FCC 2d at 920.

quirements for specialized communications service." [3] The Commission stated that it was "clear that the proposed facilities and services of the applicants have several technical and service offering features which are different from those now provided by the established carriers." [4] From the outset, the new carriers have been expected to innovate. The Commission agreed with its staff's earlier conclusion that the new specialized carriers "would be under pressure to innovate to produce those types of services which would attract and retain customers." [5]

During the pendency of the *Specialized Carrier* proceeding, the Commission instituted another apposite rulemaking proceeding to consider a proposed requirement that all carriers, before instituting new services on existing facilities, obtain prior Commission consent. After deliberation, the FCC concluded, to the contrary, that both the established and new carriers should be free to institute new service offerings merely by filing tariff revisions rather than being required to obtain prior authorization from the Commission. *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities* (Docket No. 19117), 39 FCC 2d 131 (1973). The Commission stated, at 135, that:

> In connection with possible revisions of our tariff rules, we recognize that the termination of the rule making proposed herein will make it possible for domestic carriers, as a general rule, to offer new classes or subclasses of communications service over duly authorized facilities merely by filing of appropriate tariff revisions properly supported by the cost and other data required by Part 61 and otherwise in conformity with our rules.

[3] 29 FCC 2d at 909.

[4] 29 FCC 2d at 919.

[5] 29 FCC 2d at 910.

After its *Specialized Carrier* decision, the Commission undertook detailed review of the individual specialized carrier applications and disposed of the other questions that had been raised in the petitions to deny filed by AT&T and its allies.

It is important to note that MCI's system, like the systems of other specialized carriers, is construed to provide communication capacity only between in-city terminals MCI has constructed in the cities it serves. It would be both economically burdensome and wasteful to expect the specialized carriers each to duplicate the existing facilities of the local telephone monopolies to extend beyond their in-city terminals out to the points to which their customers wished their communications brought. MCI realized, as did AT&T, that MCI would be dependent upon local telephone companies, primarily those of AT&T, to provide the required local interconnections between MCI's terminals and its customers' termination points.[6]

Throughout most of MCI's initial construction period during 1972 through mid-1973, MCI engaged in extensive negotiations with AT&T in order to obtain adequate interconnection. By the fall of 1973, however, it became abundantly clear that AT&T would not provide MCI with local interconnections required for certain services, including a private line service known in the industry as "FX" or "foreign exchange." FX is a service which, in the desired distant city, terminates in a business telephone arrangement, a device which, like a local telephone line, gives the private line subscriber access to switched local exchange service in the distant city. For example, with New York FX service, a businessman in Washington can reach—and can himself be reached by—all telephone subscribers in New York City.

[6] In *Microwave Communications, Inc., supra*, the Commission had retained jurisdiction in order to assure that AT&T would live up to its interconnection obligation.

To resolve the local interconnection dispute, the FCC, in December 1973, initiated a show cause proceeding against AT&T. While the Commission relied upon the record compiled in the *Microwave Communications, Inc.* and *Specialized Carrier* proceedings, it also afforded AT&T a further opportunity to justify its refusal to supply local interconnection. After extensive pleadings and oral argument by AT&T and other parties, the Commission reaffirmed AT&T's obligation to furnish MCI and the other specialized carriers with the local facilities needed for the rendition of all their services, including FX.[7]

Execunet

On September 10, 1974, MCI filed a tariff revision to set forth rates for a new category of specialized service called "metered use service."

Metered use service was designed for those business customers whose communications requirements are not sufficiently extensive to justify full-time private line service.[8] Metered use service was also designed to enable the

[7] *Bell System Tariff Offerings*, 46 FCC 2d 413 (1974), *aff'd*, *Bell Telephone Company* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975).

[8] For instance, a full-time private line between Washington, D.C. and Chicago is priced, under MCI's current tariff, at approximately $550 per month. By permitting a group of business customers to share a number of MCI's intercity circuits, however, MCI is able to reduce its costs to the point where the price to the customer of a one-minute Execunet call between Washington and Chicago is approximately 30¢. Execunet service entails a minimum charge of $75 per month (plus monthly recurring termination charges which average approximately $25) with the result that its market is limited to customers whose communications requirements to the limited number of cities served exceed the minimum charges. If the average distance of calls placed were equal to that between Washington and Chicago, the customer would have to use Execunet to the extent of 333 minutes per month. So, while Execunet service is attractive to a good number of businesses not having sufficient communications volume to justify a full-time private line, its attractiveness is in turn limited to those businesses which have substantial requirements among the cities served.

heavier-volume user to supplement his other MCI services and thereby obtain a more efficient mix of services matching his specific requirements. Metered use service allows MCI, through innovative service offerings, to attract new and supplemental business and thus produce sorely needed revenues to help offset its substantial fixed costs.

During the 30-day public notice period preceding effectiveness of MCI's metered use tariff revision, any competing carrier or otherwise interested party could have objected. None did so. The Commission also had the opportunity to question or challenge the tariff but did not do so.[9] As a result, the revision became effective on October 10, 1974. After arrival of required special equipment, MCI began marketing Execunet in January 1975. Execunet permits its users, in effect, to share FX circuits which terminate in a limited number of distant cities. One additional innovative feature distinguishes Execunet from other metered services. Instead of requiring that access to the Execunet network

[9] The FCC states, at page 10 of its instant petition, that, at the time MCI's metered use tariff became effective, the staff of the Commission was seeking clarification of the services the revision described, the desired inference being that the staff had from the outset questioned MCI's authority to provide Execunet service. This is an inference stated far more baldly in prior writings of the Commission and its counsel. However, in an affidavit filed with the lower Court on July 7, 1975, an officer of MCI categorically refuted this inference. He reported each conversation that had taken place between the staff and MCI regarding the tariff and made it clear that during none of those conversations had it even been suggested that MCI did not have authority to provide Execunet. Yet, this factually erroneous inference has surfaced time and time again. After failing to offer any evidence to the contrary, after denying MCI's Request for Admission as irrelevant and after refusing an MCI request for a hearing on the matter, it is inappropriate for the FCC to attempt to mislead the Court as to the nature and significance of the discussions that occurred between representatives of MCI and the Commission's staff.

be accomplished by means of a dedicated local distribution facility between the customer's office and MCI's terminal—thus limiting the customer's use of the service to times when he is in the office—MCI has devised a means (essentially a pre-programmed computer) which permits the customer to access Execunet when at the airport or at a supplier's office, for instance. However, despite its advantages to customers, Execunet does have its limitations.

Execunet is in fact a specialized business communications service provided to business users in 18 cities. As the switching hardware used by MCI will not accept rotary dial signals, Execunet can be accessed only by those customers who have, or are willing to incur the additional expense of installing, push-button phones [10] or other special equipment. Execunet is limited to those customers whose customary calling to the 17 other Execunet cities [11] is sufficient in quantity to justify: (a) the payment of a monthly minimum charge of $75, plus both calling city and distant city termination charges; (b) a thirty-day commitment to Execunet; and (c) a commitment to terminate Execunet service only upon thirty days' notice. Also, the offering of Execunet is restricted to those customers to whom the other substantial limitations of Execunet (*e.g.*, inability to place person-to-person, collect, or conference calls) are acceptable.

The MCI facilities used in Execunet service are shared among its subscribers, who are charged on an as-used, or metered, basis. Computerized hardware utilized in

[10] Only about 16% of telephones are push-button equipped, and of these, more than 80% are residential telephones. In view of the economic characteristics of Execunet service, residential users are highly unlikely to become Execunet customers.

[11] While AT&T's MTS users can reach every other telephone in the United States through more than 22,000 toll rate centers, and beyond that, can call 98.3% of the world's telephones, Execunet accesses only those telephones in the 17 other Execunet cities.

Execunet service [12] gives the user, after he has identified himself as "authorized" to use the service by pulsing in a preassigned identification code, the first available FX facility to the city desired. The same computerized hardware enables MCI to provide the customer with a detailed monthly invoice which lists each usage and its duration (expressed in tenths of a minute), indicating the number called and other valuable information permitting Execunet customers to allocate their intercity communications expenses easily and accurately.

The fact that the metered-use-service revision to MCI's tariff became effective without opposition encouraged MCI to acquire and install the substantial capital plant, primarily the computerized hardware apparatus, required for the provision of Execunet service.

The Agency Proceeding

In the spring of 1975, months after MCI began marketing Execunet, AT&T began a surreptitious campaign of *ex parte* presentations to members of the Commission and its staff against MCI's Execunet service. At the time, MCI knew nothing of this campaign, but learned of it only later.[13] Even now, however, MCI does not know

[12] MCI's Execunet hardware is sometimes called "switching equipment", but this is inaccurate terminology to the extent that it conjures up a picture of the immensely complex system of hierarchical step switching, with alternative routes capacity, used by AT&T to provide its MTS service. MCI's equipment merely identifies the city to which a particular call is being placed and then selects the appropriate direct FX facility.

[13] After repeated, largely unsuccessful attempts to put the full extent of AT&T's *ex parte* meetings on the record of this case, it is now nonetheless known from subsequently submitted affidavits that AT&T argued its case forcefully. It is known that AT&T used a tone generator (a device which produces push-button signalling) and various documentary materials to present its case. It is known that at least several of the Commissioners were personally involved in receiving AT&T's presentations. It is known that there was an arrangement between AT&T and representatives of a major non-Bell telephone company to obtain an Execunet authorization

every consideration and argument AT&T advanced, and the Commission has rejected every attempt by MCI to find out.

MCI's first notice of potential controversy came in the form of a brief letter, dated May 19, 1977, from AT&T to the Commission's Chairman, which the Chief of the Commission's Common Carrier Bureau forwarded to MCI two days later. The AT&T letter was a scant page and a half, contained a purported description of Execunet service, alleged that Execunet was identical to AT&T's long distance message telephone service, claimed (without citation to any authority) that Execunet was beyond MCI's authority and asked that the Commission "take appropriate enforcement action to stop the unauthorized Execunet service." In forwarding the AT&T letter to MCI, the Common Carrier Bureau Chief indicated that MCI's "comments on this matter would be appreciated."

MCI responded to the Bureau Chief's request in a seven-page letter denying in some detail each of AT&T's conclusary allegations. Four days later, MCI wrote a further letter to the Bureau Chief, stating its belief that AT&T's real objections to Execunet, apart from those set forth in its initial seemingly innocuous letter, had been presented in an *ex parte* manner, by telephone and in person, to members of the Commission and its staff prior to the time AT&T's letter had been written. MCI requested the Bureau Chief to obtain from AT&T the names of all its personnel who had spoken to Commission per-

---

code for use in offering demonstrative evidence regarding Execunet to members of the Commission. It is known that one of the parties to this arrangement stated that: "We will bury MCI." It is known that at least one individual who occupies a decision-making position with the Commission made a remark showing that he had been influenced into reaching a firm adverse judgment against MCI. The unprecedented celerity with which the Commission acted in 1975 also makes obvious the effectiveness of AT&T's *ex parte* presentations.

sonnel about Execunet, the names of the people at the Commission to whom AT&T had spoken, the date and length of those conversations, the brochures or other materials used, and the substance of the oral presentations made. The Bureau Chief rejected MCI's request.

After a second more detailed AT&T letter, MCI wrote a third letter to indicate that MCI was preparing a detailed reply. The letter stated MCI's belief that AT&T, in its *ex parte* presentations, had completely pre-sold its position to the Commission and that, in order to respond effectively, MCI would have to be informed as to the scope and content of AT&T's presentations. MCI also pointed out that the Commission, in its 1973 decision in Docket No. 19117, *supra*, had decided that domestic carriers should be free to offer new classes of service merely by the filing of appropriate tariff revisions.

Less than 24 hours after delivery of MCI's third letter, the Commission sent MCI a letter order in which it rejected MCI's tariff "insofar as it purports to offer Execunet service." [14] The letter cited no statutory authority and contained no discussion of, much less any finding concerning, the public interest.

---

[14] The Commission's letter order informed MCI for the first time that several Commissioners had had questions concerning Execunet service even before speaking to AT&T's representatives about it. The letter stated the Commission's understanding of Execunet service but failed to state how it had arrived at its understanding—or to concede that MCI had been given no opportunity to reply to anything other than AT&T's initial short conclusary letter. On the basis of the Commission's understanding, and on the basis of a paraphrase of the arguments set out in AT&T's second letter, the FCC declared that, "under the factual situation presented here," Execunet is "essentially a switched public message telephone service rather than private line." The FCC failed, and its failure persists to this day, to define "switched public message telephone service." Further, without even discussing its decision in Docket No. 19117, the Commission asserted that MCI was permitted to operate its facilities only for "private line service" and concluded that MCI must therefore cease providing Execunet within thirty days.

On July 3, 1975, MCI filed its petition for review with the lower court, and on July 7, 1975, it filed a motion to stay the effectiveness of the Commission's action. MCI's stay motion, which was opposed by the FCC, AT&T and USITA, was granted. Shortly thereafter, the FCC asked the lower court to hold its review in abeyance until the FCC could consider the matter further.

In the supplemental proceeding before the agency, MCI, in an attempt to be able to address specific alleged violations of the Communications Act, moved [15] that the Commission require AT&T, as the complainant in the case, to specify its objections to Execunet in a sworn formal complaint in accordance with Commission complaint procedures.[16] The Commission simply ignored MCI's motion and proceeded on the basis of permitting interested parties to file comments and then reply comments ten days later. The Commission denied MCI's motion for a hearing to discover the nature and import of AT&T's *ex parte* presentations.[17]

After the conclusion of oral argument late in the afternoon on May 24, 1976, the Commission, in a meeting which could not have lasted more than a few minutes,

---

[15] Motion to Modify Procedures, December 5, 1975.

[16] The Commission's complaint procedures require that the complainant specifically set forth fully which provisions of the Communications Act, or of Commission rules, orders, or regulations, have been violated and how they have been violated. 47 C.F.R. § 1.722. The responding carrier is entitled to submit an answer within the time specified in the Commission's formal notice of complaint, 47 C.F.R. § 1.730, and may move to make the complaint more definite and certain. 47 C.F.R. § 1.731. In the Execunet proceeding, however, the FCC totally ignored its own procedural rules.

[17] The FCC also denied MCI's motion to depose the AT&T official who had given an affidavit to the lower court concerning the *ex parte* presentations and a motion to direct AT&T to preserve evidence concerning the *ex parte* presentations.

issued a brief public announcement [18] affirming its 1975 letter order and directed its staff to develop an opinion supporting its conclusion. The formal opinion was released on July 13, 1976.

The FCC opinion was premised on the argument that the certifications of MCI's lines were subject to an implicit condition limiting the services which could be provided over these facilities to "private line services." The opinion then proceeded to formulate a new definition for private line services which excluded MCI's Execunet service.[19]

---

[18] FCC Report No. 11955, entitled "FCC Rules on Execunet Service".

[19] "Private line service," which petitioners argue is the permissible service universe for MCI, had never been given any precise meaning by the FCC prior to the proceeding below. As used in the industry, the meaning of the term evolved as new services were introduced. When the FCC stated that up until the Execunet case "there had been no confusion or debate over the meaning of private line service," (FCC App. 61a), it was technically, if not logically, correct. There had been no confusion because, up to that point, the definition had never been of decisional significance, and, just as there had been no debate, there had been no decision on how to define the term. The first decision definition of private line service appeared in Paragraph 61 of the FCC's 1976 Execunet order (FCC App. 62a), and this definition was created out of thin air. In a bold stroke, FCC counsel have created yet another definition of private line service especially for the present petition (pet., p. 6). This definition, which includes dedication of facilities "in some meaningful respect" to a customer's personal use, "instant connection without the need for dialing," and charges "at a flat periodic rate," contains elements at variance with those services which even the Commission decision below classifies as private line (FCC App. 63a; *see id.* 151a).

AT&T's petition (p. 5, n.8) refers to Section 21.2 of the FCC's rules, 47 C.F.R. § 21.2 (1976), for a definition of private line service. This outdated definition is not relied upon by the FCC, as it does not encompass services, such as FX, which AT&T itself includes in its own private line tariff. The FCC also classifies FX as a private line service. The court below (FCC App. 17a) recognized that the FCC has not applied the definition in Section 21.2 to Subsection I of Part 21, under the terms of which MCI receives its authorizations.

In the lower court, MCI argued, not only that its certifications were not subject to pre-existing service limitations, either explicit or implicit, but also that, even if it were assumed *arguendo* that MCI were limited to "private line" service or "specialized" service, Execunet would fall within either of these categories. MCI also argued that it had been deprived of its due process rights in view of the undisclosed nature of AT&T's *ex parte* presentations and in view of the FCC's curtailing of its normal hearing processes. These secondary arguments were rendered moot when the lower court reached its decision that there were in fact no pre-existing conditions on MCI's facility certifications. If the relief requested by petitioners were granted and the lower court be reversed, it would, of course, be necessary for the lower court to address these additional questions on remand.

ARGUMENT AGAINST GRANTING CERTIORARI

Summary

The decision below, which was unanimous, is based upon the court's interpretation of the unambiguous language of Section 214 of the Communications Act of 1934, 47 U.S.C. § 214. The court's interpretation was clear, straightforward and correct. There is no constitutional issue at stake. Further, the decision does not deprive the Commission of authority or ability to regulate effectively. Indeed, the decision specifically points out that the commission is fully empowered to conduct a hearing on the basic issue of public interest which lies at the heart of the controversy.

In the proceeding below, the FCC did not purport to make any public interest determination but, instead, reached its conclusion on the basis of a contention that pre-existing implicit restrictions on the certifications of MCI's lines obviated any need to consider whether the

public interest required that MCI be prohibited from using its previously certificated lines to offer Execunet service. The agency's contention in this regard is inconsistent with prior statutory interpretation and administrative practice.

The lower court's decision mooted a number of hotly contested questions, such as whether MCI's Execunet service could be categorized as a "private line service" or "specialized service", whether the FCC's orders had been tainted by AT&T's initial *ex parte* contacts and whether the Commission's procedures were otherwise compatible with the requirements of due process. Instead, the lower court's decison permits the Commission to address now instead the fundamental issue of public interest, rather than the artificial and sterile question of how to categorize new and rapidly changing communication services with outdated and vague terminology.

The lower court's decision is not at variance with the holding of any other court decision. The statements cited by petitioners from decisions by two other courts are merely prefatory and, not even rising to the status of dicta, are of no decisional significance. The decision below is the first and the only judicial decision to consider whether there are implicit restrictions on the certifications of lines of specialized carriers to limit the services that can be offered thereon. The lower court's holding is based, not upon any ambiguous or conflicting law, but rather upon the plain and, in fact, inescapable meaning of the statute.

The lower court's decision gives AT&T another full opportunity to demonstrate to the Commission why the public interest requires that competing common carriers be restricted from providing certain categories of service. While the issue of competition's role in the telecommunications industry is perhaps an interesting one, the petitions for certiorari do not, and in fact cannot, bring that

issue before this Court in the present case. The lower court's decision will also give the current members of the Commission the opportunity to consider the merits of AT&T's public interest contentions, free of any distortions that may flow from a misconception as to what their predecessors may or may not have intended.

I. The Lower Court Accurately Interpreted Section 214 of the Communications Act

Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), provides for certification of "lines," not services. A "line" is defined by Section 214(a) to mean any "channel of communication established by the use of appropriate equipment . . . ." While under Section 214(c) the Commission may attach "to the issuance" of a certificate "such terms and conditions as in its judgment the public convenience and necessity may require," absent such terms and conditions, Section 214 does not require new certification when previously certified lines are used for new services. A new classification of service, not involving the construction, extension, acquisition, or operation of a new line, is initiated by a tariff filing. *Long Island R.R.* v. *New York Cent. RR.*, 281 F.2d 379 (2d Cir. 1960); *New York Dock Ry.* v. *Pennsylvania R.R.*, 62 F.2d 1010 (3d Cir.), *cert. denied*, 289 U.S. 750 (1933). Tariff filings designed to offer a new service over existing facilities are governed by the procedures and criteria established under Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204 and 205.

Section 214 of the Communications Act was patterned after Section 1 (18-22) of the Interstate Commerce Act, 49 U.S.C. § 1 (18), which was enacted to regulate the construction or acquisition of railroad lines.[20] Under the Interstate Commerce Act scheme of regulation, the ICC

[20] *See* S. REPORT No. 781, 73d Cong., 2d Sess. 5 (1934); H.R. REPORT No. 1850, 73d Cong., 2d Sess. 6 (1934).

certified the introduction of new railroad lines and used tariff procedures to regulate the services provided over those lines. Railroads did not require new certifications to introduce new rolling stock or to carry new commodities. For example, a railroad which had initially justified the use of a line to carry lumber on flat cars drawn by steam locomotives might use the same tracks later, without further certification, to carry chemicals in tank cars or fresh vegetables in refrigerated cars drawn by diesel-powered locomotives. All these changes could take place despite the fact that, in initially certifying the line, the ICC had considered only the carriage of lumber in weighing the public need for construction of the line. The same statutory language and practice were carried over to the communications industry. Thus, it is possible for a communications common carrier to initiate new communications services on previously certificated lines without further certification. For instance, when AT&T developed the switching equipment to provide Direct Distance Dialing, it used previously certificated lines for the provision of MTS (the universal voice message service using the switching technology) without any further certification. Years later, AT&T introduced its new Wide Area Telecommunications Service (WATS), again without any new certification of existing lines.

As the court below observed, the primary purpose of Section 214(a) is the prevention of unnecessary and uneconomic duplication of facilities and not the regulation of services (FCC App. 21a). For instance, the right of Western Union Telegraph Company to introduce, without further certification of its existing lines, its new "Mailgram" service,[21] a far greater departure from ear-

[21] Western Union provides Mailgram in collaboration with the U.S. Postal Service. Messages from a number of different Western Union sources are received by Postal Service teleprinters and then delivered in the ordinary local mail to the designated recipient. Needless to say, this service was not even contemplated at the time most of Western Union's lines were certificated.

lier services than is MCI's Execunet service, was upheld in *United Telegraph Workers* v. *FCC*, 436 F.2d 920 (D.C. Cir. 1970).

The obviously limited function of the certification process is, indeed, made doubly obvious by the final provision to Section 214(a) which states expressly that:

> nothing in this section [214] shall be construed to require a certificate or other authorization from the Commission for any . . . changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

Clearly, the offering of a new service, like any other change in operation, does not require any further certification of the line unless the original certification has been made subject to a lawful condition which precluded that service.

Section 214(c) of the Communications Act, 47 U.S.C. § 214(c), which controls the imposition of conditions, provides, in relevant part, that (emphasis added):

> The Commission shall have power to issue such certificate as applied for, . . . or for the partial exercise only of such right or privilege, *and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.*

The court below held that the "Commission must strictly follow the terms of Section 214(c) and it cannot impose any such restriction unless it has affirmatively determined that 'the public convenience and necessity [so] require'" (FCC App. 24a). In so doing, the court was merely restating the express command of Section 214(c).

Indeed, the Commission itself implicitly recognized this legal standard when it took the position, in its 1975 letter order, that explicit conditions had been imposed

on MCI's certifications (FCC App. 101a). But, in its 1976 Decision, the Commission acknowledged that the cited language applied only to some of MCI's authorizations[22] and concluded, effectively abandoning the argument, that "thus it is necessary to look further" (FCC App. 49a). It was only after the agency realized that it would need "to look further" that it developed its novel theory of *implicit* conditions, a theory found wanting of support by the lower court.

In shifting to a theory of *implicit* restrictions upon MCI's facility authorizations, the Commission ignored its own subsequent and more explicit determination regarding the introduction of new services set forth in Docket No. 19117, *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications on Interstate or Foreign Common Carrier Facilities*, 39 FCC 2d 131 (1973), where it concluded that it "should not impose at this time any requirement for prior approval of new or revised service offerings by existing or new carriers," 39 FCC 2d at 133. The Commission's decision in Docket No. 19117 made "it possible for domestic carriers, as a general rule, to offer new classes or

---

[22] The orders cited involved only a handful of MCI's lines and were issued during the period when, *prior* to the agency decision in Docket No. 19117, *supra*, the Commission had, as a tentative step—contrary to traditional practice—imposed conditions upon all of its Section 214 certifications of both MCI and AT&T facilities—conditions subsequently removed when the Commission reached its decision in that proceeding. The cited language, in any event, was not intended to be restrictive as asserted, but represented merely a general description of the services proposed by MCI at that time, analagous to the railroad initially justifying its construction of a new line by reference to the carriage of lumber drawn by steam locomotive. The interpretation by the 1975 Commission of that language depended on its own narrow and unsupported interpretation of the term "private line" used therein, which in any event was qualified in the language cited by the word "essentially" and further qualified by the addition of the phrase "and other communications."

subclasses of communications service over duly authorized facilities merely by the filing of appropriate tariff revisions," 39 FCC 2d at 135. Not surprisingly, neither the FCC nor AT&T in their petitions for certiorari discussed or even acknowledged the existence of this decision—despite the fact that it had been treated extensively both by MCI and the Court of Appeals below.

Prior to the Commission's action of July 2, 1975 with respect to Execunet, the policy reaffirmed in Docket No. 19117 had governed the telecommunications industry. Departure from that long standing policy, which appeared to be the initial thrust of Docket No. 19117, was conceived as a corollary to the *Specialized Carrier* decision, *supra*, in which the Commission, while concluding that competing carriers should be encouraged to develop new service offerings, perceived what appeared to be a potential danger to its policy. The Commission, in its Notice of Inquiry in Docket No. 18920, the *Specialized Carrier* proceeding, had said, 24 FCC 2d at 331:

> We note in this connection that the applicants are in a disadvantageous competitive position vis-a-vis AT&T insofar as prompt inauguration of the proposed services is concerned. Action on their applications may be delayed for some time by the necessity of resolving claims in petitions to deny, *inter alia*, that the showing of need is inadequate. Since AT&T has numerous long line facilities, both cable and radio, and many diverse routes, it generally has enough flexibility and spare capacity to institute new services (at least on a limited scale) without having the immediate necessity of obtaining authorization for new or modified facilities. Therefore, AT&T need only file a tariff in order to commence providing service on its authorized facilities. AT&T is thus in a position to offer at any time services with many of the features proposed by the applicants, while challenging the showings of need made by would-be new entrants and claiming that hearings are required on their proposals.

It was to correct this inequity that the Commission began, as a tentative measure, attaching conditions to facility authorizations of both the established and new carriers. In instituting Docket No. 19117, the Commission was seeking to provide a reasonable opportunity for the competitive development of the market for specialized communications services. On the record made in that proceeding, however, the Commission reversed its initial direction and determined that it would not treat new service offerings as requests for new certification under Section 214 of the Communications Act, 47 U.S.C. § 214. It would, instead, treat tariff filings offering new services like any other tariff revisions submitted by carriers under the provisions of Sections 204 and 205 of the Communications Act, 47 U.S.C. §§ 204 and 205.

As indicated, the Docket No. 19117 decision restored the practice that had been traditional in the domestic common carrier field. When in 1960 AT&T sought to introduce a new service it called WATS, it did not apply for any new certifications. It merely filed a tariff which offered the service over its previously authorized facilities.[23] The Commission's decision in Docket No. 19117 not to impose the limitations initially proposed constitutes a rule of general applicability. The Commission concluded that it "should not impose at this time *any* requirement for prior approval of new or revised service

---

[23] Pursuant to Section 204 of the Act, the Commission instituted an investigation into the lawfulness of the tariff, to determine whether the offering complied with Sections 201 and 202 of the Act. However, there is no indication, in either the Common Carrier Bureau's recommended decision (37 FCC 688 (1964)), or in the Commission's order terminating the WATS proceeding (38 FCC 475 (1965)), that AT&T was subject to any requirement that it obtain *prior* authorization for the offering of the new service.

offerings by *existing* or *new* carriers." 39 FCC 2d at 133 (emphasis added).[24]

* * * *

In its petition, the Commission confuses the statutory provision for certifying communications common carrier lines found in Section 214 of the Communications Act of 1934 [which, as noted at footnote 3 (page 3) of the FCC's petition, was patterned after Section 1 (18-22) of the provision of the Interstate Commerce Act regulating railroads, 49 U.S.C. § 1 (18)] with the disparate provisions of the Motor Carrier Act of 1935 regulating motor vehicle common carriers and motor vehicle contract carriers. The Motor Carrier Act of 1935 has been designated as Title II of the Interstate Commerce Act and is found at 49 U.S.C. § 301 et seq. The issuance of certificates of convenience and necessity to motor vehicle *common* carriers is governed by 49 U.S.C. § 306 while 49 U.S.C. § 309 provides for the issuance of permits to motor vehicle *contract* carriers to engage in particular services. As noted in the Court's decision in *Noble* v. *United States*, 319 U.S. 88, 90 (1943), Section 209(b) of the Motor Carrier Act of 1935, 49 U.S.C. § 309(b), provides that the "Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof." In *Noble*, the Court observed that the statutory requirement to specify the "business" of a contract carrier in a permit meant specifying the scope of the articles carried. In applying this principle to the

[24] Indeed, the Commission specifically pointed to the tariff filed by Microwave Communications, Inc., to be effective on one day's notice, on January 1, 1972, as the kind of tariff which would have been delayed, contrary to the Commission's objectives in the *Specialized Carrier* proceedings, if it had been subject to the kind of prior approval requirement under consideration in Docket No. 19117. 39 FCC 2d at 134.

"grandfathering" of a pre-1935 contract carrier operation, the Court upheld the ICC decision that the grandfathering clause of that statute could not be used to "enlarge and expand the business beyond the pattern which it had acquired prior to July 1, 1935," and declared that "the result in the present case would be a conversion for all practical purposes of the contract carrier into a common carrier—a step which would tend to nullify a distinction which Congress has preserved throughout the Act." 319 U.S. at 92.[25] In the present case, the FCC would convert MCI, for all practical purposes, from a common carrier into a contract carrier—a category Congress did not create in enacting the Communications Act.

* * * *

The difficulty petitioners' counsel have in finding anything even remotely inconsistent in the lower court's exposition of the clear meaning of Section 214 is reflected in their attempt to rely upon *Hawaiian Telephone*

[25] The FCC petition gives the impression that, in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 299-300 (1974), this Court made a substantive ruling concerning the lawfulness of a motor carrier certificate to the extent that it exceeded the scope of the application. This impression is misleading. This Court reversed a district court decision setting aside an ICC grant of certificate on other grounds and, since the district court had not ruled on the claim by several parties regarding the grant of authority in "excess" of that sought in the application, remanded the case to the court—noting that the "issue was not briefed or argued here." 419 U.S. at 299. Upon remand, the district court upheld the ICC certificate insofar as it included service to Montgomery, Alabama despite the fact that service to Montgomery had not been included in the initial application. *Arkansas-Best Freight System, Inc.* v. *United States*, 399 F. Supp. 157, 162 (W.D. Ark., 1975) *aff'd*, 425 U.S. 901 (1976). The district court did overturn the ICC decision to the limited extent of eliminating the possibility of "tacking" or joining the lines being certified to Bowman in the proceeding under review to other lines certified to Alabama Highway Express which Bowman acquired subsequent to the hearing. The question of "tacking", of course, relates to the definition of lines being certified and not to the question of what services may be offered over the lines.

Co. v. *FCC*, 498 F.2d 771 (D.C. Cir. 1974). The opinion in that case was written by Judge Wilkey who joined in the opinion of the court below with Judges Wright and Tamm. The opinion below pointed out that *Hawaiian Telephone* does not "transmogrify" Section 214 so that carriers must obtain Commission approval before implementing new services (FCC App. 21a-22a).

The reference by FCC counsel to *Hawaiian Telephone* and *FCC* v. *RCA Communications, Inc.*, 346 U.S. 86 (1953) is a non-sequitur. It is of course necessary to consider proposed services in determining whether there is a public need for proposed new lines, but such consideration does not imply that the lines can be used only for service initially proposed. As the lower court observed, there is "no indication that the *Hawaiian Telephone* court contemplated such a remarkable result." (FCC App. 23a).[26]

II. The FCC's *Specialized Carrier* Decision Did Not Result In the Imposition of Conditions Upon MCI's Authorizations

No conditions limiting service are on MCI's instruments of authorization. Indeed, MCI's facility certifications, like those of AT&T, are issued under Subpart I of Part 21 of the Commission's Rules, governing the "Point-to-Point Microwave Radio Service."[27] Unlike other subparts of Part 21,[28] Subpart I imposes no service limitations as to facilities authorized thereunder. In fact, such facilities are specifically subject to the provision of 47 C.F.R. § 21.705, which states that carriers subject to

[26] Indeed, *Hawaiian Telephone* and *RCA*, like the decision below, represent a strong judicial insistence that the FCC make the required statutory public interest findings.

[27] 47 C.F.R. §§ 21.700 to 21.713.

[28] *See, e.g.*, 47 C.F.R. §§ 21.903(b), 21.509 and 21.606.

Subpart I are "authorized to render any kind of communication service provided for in the legally applicable tariffs of the carrier, unless otherwise directed in the applicable instrument of authorization . . . ."

In its 1976 decision, the FCC recognizes "the truism that a carrier need not generally file an application for each new service it wishes to offer" (FCC App. 55a), but then proceeds to state that a tariff "cannot be used to reverse a *clearly defined* Commission policy." (Emphasis added). In so doing, the Commission tries to jump the large gap between an explicit condition properly imposed pursuant to Section 214(c) to a "clearly defined Commission policy." It then attempts yet another large jump from the notion of a "clearly defined Commission policy" to the highly dubious inference it purports to draw from the *Specialized Carrier* decision to the effect that the specialized carriers are to be limited to some theretofore ill-defined service category called "private line services."

The *Specialized Carrier* decision made clear the Commission's desire to encourage and stimulate innovation. In so promoting innovation, the 1971 Commission must have recognized that the services to be offered by the new carriers could not realistically be limited within the narrow ambit of what AT&T chose to include in its own list of "private line" services. Indeed, the 1971 Commission had before it at the time a novel switched, metered service proposed by another specialized carrier—a service which was subsequently initiated and made available for several years.[29]

The Commission, in issuing its Notice initiating the *Specialized Carrier* proceeding, stated the following as the primary issue:

[29] See discussion of the service of Data Transmission Company, 29 FCC 2d at 872.

> A. Issue A: Whether as a general policy the public interest would be served by permitting new entry in the *specialized communications field*; . . . (29 FCC 2d at 880, emphasis added).

It also noted (Para. 27 of the staff's analysis, *quoted*, 29 FCC 2d at 881) that: "In its *MCI* decision, the Commission granted applications of MCI to provide *specialized interstate common carrier services* . . . ." (Emphasis added). And, in its decision, the Commission stated its ultimate conclusion as follows:

> *Findings and conclusions.* 103. In light of all of the foregoing and the record as a whole, we adopt our staff's analysis of Issue A, as amplified and modified herein. We find that: there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the *specialized communications field* is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a *general policy* in favor of the entry of new carriers in the *specialized communications field* would serve the public interest, convenience, and necessity. (29 FCC 2d at 920, emphasis added).

In embarking upon and concluding its forward-looking proceeding to consider the introduction of new carriers, the Commission was not confining its consideration to any narrow category of private line services—though it discussed such services [30]—but rather was dealing with

---

[30] The term "private line service" was used generally in the context where comparisons were being drawn to AT&T services—since that term was an AT&T term and it most closely approximated the types of service initially contemplated by the new

a broader, more general, but undefined, area which it called "the specialized communications field."

The court below observed that, "to the extent that any definition of a 'specialized carrier' emerges from the Commission's discussion, that definition appears to be simply that a specialized carrier is any carrier that does not attempt to optimize its service offerings to the voice communications needs of the general public. *See* [29 FCC 2d] at 882 (¶ 29); *id.* at 906-907 (¶¶ 69-70)" (FCC App. 29a, fn. 68). Indeed, the lower court defined a "specialized carrier", in another case, as one "whose service is of possible use to only a fraction of the population." *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). The limited number and capacity of the transmission facilities used by specialized carriers assure that their service "is of possible use to only a fraction of the public." No condition on certifications was required to establish this limitation, and none was suggested.

In the *Specialized Carrier* proceeding, the Commission was addressing specific questions of public policy. Other questions were left for treatment in the context of action upon individual applications and, in the case involved here, for treatment by general rule in Docket No. 19117. The Commission was not in the *Specialized Common Carrier* decision framing conditions which were to be attached, by any process of implication, to its later grants of specific authorizations.

---

carriers. More generally, however, the 1971 Commission used such terms as "specialized private line services," "specialized communications services," "special communications services," "customized communications," "common carrier communications services," "competitive common carrier services," "data communications," "new communications services," "services that are heterogeneous in character," and other variations.

Indeed, the *Specialized Carrier* decision specifically acknowledged that alleged problems relating to new services should be handled in future tariff proceedings:

> In the event that adverse consequences to the public should develop, the Commission can take such action on the relevant tariff filings as may be necessary to protect the public. We think that in the context of the matters now before the Commission involving proposed new and different services, a question of this nature is more appropriately considered in connection with the tariffs rather than upon authorization of the facilities.[31]

Petitioners make the new argument that MCI "never sought authorization beyond private line services." Quite the contrary, MCI specifically sought certification of its lines pursuant to the terms of Subpart I of Part 21 of the Commission's Rules, governing the "Point-to-Point Microwave Radio Services," which would permit it to offer any properly tariffed services which its limited facilities might be capable of providing. *See* 47 C.F.R. § 21.705, *supra*. MCI proposed no condition upon its certifications and none was imposed.

In order to demonstrate the need for its facilities, MCI set forth, in general terms, the types of services it proposed to provide initially.[32] It did not, however, propose to limit itself to those services for the indefinite future. Indeed, MCI dedicated itself from the outset to develop

[31] 29 FCC 2d at 886, note 26.

[32] In describing its prospective services MCI sometimes referred to them as "specialized" or "customized" services and, on relatively infrequent occasions, it used the term AT&T uses to refer to its nonuniversal services—"private line services"—as the nearest analogy in AT&T's vocabulary to what MCI was proposing to provide. The use of such broadly descriptive terms, however, was not intended to reflect a proposal that the Commission should impose restrictions on MCI's authorizations so as to inhibit it from developing variations of traditional services or new services in the future.

new and innovative services as its experience in the market and financial capabilities increased. The Commission clearly shared this expectation.

MCI had not conceived its Execunet service until long after 1971. Execunet, which is basically a variant of shared FX service, developed as a logical extension of MCI's experience with the dissatisfaction expressed by customers with the traditional FX service, whether provided by AT&T or by MCI. Although MCI believes that Execunet can properly be classified as a private line service, such a classification is basically irrelevant. MCI's purpose in discussing particular types of service in its applications was to show that there was a public need which would be fulfilled by construction of the facilities applied for. But just as the fact that certification of a new railroad line may have originally been justified by reference to the public need for the transportation of lumber does not prevent the railroad, in the future, from using the same line to provide other services which future experience may show the public desires, neither does the justification of new communications lines on the basis of the need for one service prevent a communications common carrier from using the lines for other services in the future.

The FCC argues that, for purposes of this case, telecommunications services can be divided on an *a priori* basis into two neat categories: private line services, which are open to competition, and "MTS," which is not. This simplistic dichotomy is, by no means, generally accepted.[33]

[33] For example, Lee W. Schmidt of General Telephone & Electronics, the largest member of USITA, recently stated that: "If you look at the evolution of technology of MTS and private line in the future, they are going to become more and more and more (sic) similar until they are all but indistinguishable." Preliminary stenographic transcript of the *Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce of the House of Representatives: Discussion on Domestic Common*

Although neither private line service nor MTS (message telecommunications service) had ever been defined with any precision prior to the Execunet case, the agency based its 1975 decision on its determination that Execunet is "identical to MTS" (FCC App. 103a) and its 1976 decision on the assertion that Execunet is "indistinguishable from MTS" (FCC App. 64a). From this it should follow that the FCC had at some point provided a protected monopoly status for MTS. Yet the FCC points to no proceeding where this supposed monopoly portion of telecommunications services was either defined or bestowed upon AT&T as a protected sanctuary free from competition. Indeed, in its petition the FCC states that the "suggestion in the opinion below that the FCC has 'granted AT&T a *de jure* monopoly over MTS and WATS' . . . has no foundation in the Execunet decision or any other FCC action." (FCC Pet., p. 18, n. 34). Further, the Chief of the FCC's Common Carrier Bureau recently testified before Congress that: "I am not aware that any determination has been made that there is a

---

Carriers, September 21, 1977, pp. 17-77 [hereinafter, "*House Carrier Hearings*"].

Indeed, the Telecommunications Task Force established by AT&T together with the four largest "independent" telephone companies observed that:

> . . . it has become apparent that no clear distinction can be made between the competitive "private line service" and monopoly Message Telecommunications Service market. In economic terms, the two types of services are strong substitutes for one another, especially for large volume business users who constitute a significant portion of the Message Telecommunications Service market. In technological terms, too, the distinction between "private line service" and "Message Telecommunications Service" is rapidly dissipating.

THE DILEMMA OF TELECOMMUNICATIONS POLICY: AN INQUIRY INTO THE STATE OF DOMESTIC TELECOMMUNICATIONS BY A TELECOMMUNICATIONS INDUSTRY TASK FORCE, Part III, pp. 6-7.

natural monopoly, natural economic monopoly, in any part or certainly all telecommunications activities." [34]

Thus, in view of the absence of any condition upon MCI's certifications, it does not have any legal significance to liken MCI's Execunet to AT&T's MTS service. But, even if some legal significance could attach, Execunet clearly does not deserve being characterized as identical to or indistinguishable from MTS. The FCC, on an occasion when joined by the Department of Justice, defined public communications service for this Court as ". . . primarily . . . voice communication service from and to all points on an integrated national and international network, available to the public generally." Brief for the Respondents in Opposition at p. 3, *AT&T* v. *FCC*, 422 U.S. 1026 (1975) (Docket No. 74-1229), *denying cert. to Bell Telephone Co.* v. *FCC*, *supra*. Execunet clearly does not fall within that definition and indeed no service that MCI could possibly provide with its presently certified lines could fall within that definition.[35]

---

[34] *House Carrier Hearings*, pp. 17-53.

[35] Before the FCC, before the Court below, and in the present petitions, the petitioners continue to shift terminology and definitions on what constitutes impliedly a protected monopoly portion of telecommunications services. The principal reference to MTS in the petitions is to "ordinary long distance toll service" (FCC Pet., p. 5), "ordinary long distance service" (AT&T Pet., p. 3), and "plain old message telephone service" (USITA Pet., p. 7). None of these terms is a term of art and none was used in the agency's prior decisions.

The FCC's retreat to the simplistic formula of "ordinary long distance toll service" continues the Commission's pattern of shifting from one imprecise term to another in an attempt to make the Execunet-MTS equation credible. In the proceeding below, the Commission did not attempt to counter MCI's showing of the absence of MTS characteristics in Execunet by revealing what it considered to constitute MTS. Instead, the Commission changed its undefined understanding of MTS in the Execunet-MTS equation to "basic, station-to-station dial MTS." Rather than define MTS, the Commission, when faced with the many critical dissimilarities be-

III. There Is no Conflict With Other Decisions

Petitioners cite *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), and *Bell Telephone Company of Pennsylvaia* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975) as being at variance with the court's decision below. Petitioners are incorrect. In the first of these cases, the Ninth Circuit rejected an attempt to reverse the *Specialized Carrier* decision and, in the second, the Third Circuit upheld the Commission's rejection of AT&T's attempts to deny interconnections MCI needed for the provision of its services.

In *Washington Utilities*, the scope of the services authorized in the *Specialized Carriers* decision was not at issue. The issues in that case were whether the FCC could authorize competition at all, whether the procedures utilized by the Commission were correct and whether the FCC violated the National Environmental Policy Act of 1969. The portion of the Ninth Circuit opinion referenced in the instant petitions is a simple

---

tween Execunet and MTS, chose either to disregard MCI's points or to whittle away at what constitutes MTS by referring to many of its characteristics as nonessential "convenience features," "specialized, add-on services," or "billing procedures." The Commission further distorted the MTS-Execunet equation by adding WATS as a decisional factor in its 1976 decision. Unable to legitimately compare Execunet with MTS only, the Commission was forced to insert WATS into the final decision, even though there was no prior indication that WATS was in issue. Indeed, in the only record presentation on the characteristics of WATS, MCI submitted AT&T literature which described WATS as a private line service.

In its petition, the FCC goes one step further by urging that "MTS . . . includes . . . wide area telecommunications service (WATS)." Not even AT&T, which offers the service and created the terminology in the first place, agrees with the misleading and inaccurate statement that MTS includes WATS. The Court is left with a mishmash of undefined and imprecise terms.

general description of the services proposed in the specific applications then before the Commission. The court certainly did not observe any limiting conditions on the authorizations of the specialized carriers. Its description of the services involved was prefatory only, to indicate generally the communications needs that were being addressed, and did not form the basis for any of the court's holdings.[36]

Bell Telephone Co. v. *FCC, supra*, addressed Bell's refusal to provide various types of interconnections required for MCI's services. Bell's principal defense was the argument that it was required only to provide very limited categories of connecting facilities. Bell's secondary argument was that the Commission had not affirmatively

---

[36] It should be noted that the court spoke of "entry of new carriers in the specialized communications field," 513 F.2d at 1155, 1159 and 1166. The court also obviously took a broad view of the non-static scope of this term, observing, 513 F.2d at 1166, n. 33, that:

"As the Commission had concluded, the public interest would be served by offering users flexibility and a wide range of choice. The applicants were seeking to develop a relatively new and potentially very large market with heterogeneous submarkets. The proposals reflected differing routes and services. The various systems might develop along different lines. The number of potentially successful operations might well depend on the ingenuity, enterprise, and initiative of the participants in developing new service and equipment."

The court did distinguish the services proposed by the new carriers "from public exchange and long distance toll telephone service" and explained that the "latter consists primarily of voice communications service from and to all points on an integrated national and international telephone network, available to the public generally." 513 F.2d at 1155. The limited nature of the facilities proposed by the specialized carrier applicants, of course, made "communications from and to all points on an integrated national and international telephone network" out of the question. The limitation noted was a *de facto* limitation inherent in the physical nature of the facilities involved and not one flowing from a condition imposed on authorizations pursuant to Section 214(c) of the Communications Act.

determined that it would be in the public interest to require AT&T to interconnect with MCI for the purpose of allowing MCI to offer FX service. The Commission's determination was that the *Specialized Carrier* decision had settled the point, whereas AT&T argued that, since MCI had never mentioned FX services explicitly in its § 214(a) applications, MCI's provision of those services had not been approved. The Third Circuit affirmed that the Commission in the *Specialized Carrier* decision had made an affirmative determination that interconnection for provision of private line services was, as a general matter, in the public interest and that MCI was covered by this general determination. Bell itself had long categorized FX as private line service.[37] *Bell Telephone* therefore stands for the proposition that the Commission in *Specialized Carriers* decided at least that specialized carriers could provide all private line services. As the court below noted, however, one cannot reason from this proposition to its converse—that specialized carriers may offer only private line services—yet the converse is the issue relevant under § 214(c). Indeed, the converse appeared to be at least implicitly conceded by AT&T in *Bell Telephone*. The Third Circuit observed, 503 F.2d at 1262, that "While there is language in Docket 18920 indicating a concern with new, customized services, we interpret this language as referring not only to the types of services provided, but also to the delivery of private line services to ultimate customers who theretofore had been unable to obtain private line services fashioned to their particular needs."

The so-called "overbreadth argument" advanced by AT&T in *Bell Telephone*, is irrelevant here. AT&T's argument was that the Commission's order to interconnect services "presently or hereafter" authorized was overbroad and was directed to the difficulty of ascertaining the types of services to be authorized "hereafter." Under that decision, if MCI should in the future be authorized to build new facilities, so as to provide international service, for example, AT&T would be required to furnish interconnection. We are not, however, dealing here with the question of *new* authorizations, but rather the question of whether there are restrictive conditions on the old authorizations.[38]

[37] *MCI Communications Corp.* v. *AT&T*, 369 F. Supp. 1004, 1013 (E.D. Pa. 1973), *vacated on other grounds*, 496 F.2d 214 (3d Cir. 1974); *Bell Telephone Co.* v. *FCC*, *supra*, 503 F.2d at 1261.

IV. There Is no Legal Question of Importance Ready for the Court's Review

In seeking to convince this Court that the decision of the court below should be reviewed, petitioners put forward an issue that the Court below did not have before it and consciously avoided deciding. The issue, as petitioners put it, is whether the public interest requires that some segment of the telecommunications market be afforded monopoly protection. This serious distortion of what the case under consideration involves is in effect an

[38] *American Telephone & Telegraph Co.* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976), cited by some of the petitioners, is also inapposite. In that case, AT&T argued that specialized carriers were not permitted to offer private line services already offered by AT&T, but rather were limited to new services. There was no dispute concerning the offer of new services such as Execunet. The court recognized that the *Specialized Carrier* decision had adopted a policy in favor of open competition in the "specialized communications field," 539 F.2d at 768, and rejected AT&T's argument that the Commission could not authorize services "duplicating existing services." 539 F.2d at 772. The only matter at issue, and therefore the only matter addressed by the parties and the court, was the services that duplicate existing AT&T private line services. There was no finding that non-duplicative services, such as Execunet, were forbidden. Quite the contrary, it was tacitly assumed, even by AT&T, that non-duplicative services by specialized carriers were permitted. In the present case, AT&T contends the opposite, that the specialized carriers are limited to essentially duplicative services already provided by AT&T as "private line services."

admission by petitioners that the one substantive issue decided by the lower court—whether MCI's existing facility certifications were restricted to prevent its offering of Execunet service—is not of sufficient significance to warrant the attention of this Court.

AT&T, USITA and NARUC all offer arguments in favor of an AT&T-directed monopoly. The arguments they put forward are perhaps interesting ones, but they are not before this Court. The Court is being asked to review a decision where the proponents of monopoly failed to offer public interest arguments before the Commission and the FCC itself did not purport to act on any such basis.

A decision by this Court not to review this case will not have the effect of having petitioners' pro-monopoly assertions going unanswered and undecided. The lower court specifically invited the Commission to initiate a proceeding to determine where the public interest lies. In that proceeding, AT&T and its supporters can put forth the arguments relating to the public interest which they have prematurely set out in their current petitions.

MCI stands fully ready to meet the arguments AT&T and its supporters can raise in the Commission's new proceeding. Indeed, in the proceeding below, MCI presented the testimony of one of the country's foremost economic authorities in this area [39] to rebut AT&T's then claims of damage. This probative evidence speaks far more convincingly than do the unsupported and self-serving claims of counsel in the instant petitions. MCI also introduced numerous statements from Execunet users to explain in practical terms what the service meant to them.[40] MCI attempted to raise the public interest issue

[39] *See* Affidavit of Dr. William H. Melody, Attachment D to MCI's Comments filed on January 16, 1976 in the FCC proceeding below.

[40] *See* Attachment C to MCI's Comments filed on January 16, 1976 in the FCC proceeding below.

in the Commission proceedings below, but the FCC chose to ignore the evidence MCI offered and proceeded instead to argue that the matter could be determined on an *a priori* basis of an alleged interpretation of what the 1971 Commission had decided in its *Specialized Carrier* decision.

Petitioners seem almost reluctant to speak about MCI's "Execunet" service, speaking instead of "MTS" being provided by MCI. This fancy ignores the simple fact that MCI has very limited facilities already authorized—which serve only a relatively small number of cities and which have only a small amount of presently unused capacity. Such facilities are not capable of providing the universal message service that AT&T calls "MTS". The "fear" expressed by petitioners in this regard is unrealistic.

Petitioners attempt to buttress their feigned fear of MCI [41] by reference to other carriers. But the two other specialized carriers, Southern Pacific Communications Company and United States Transmission Systems, each has fewer transmission facilities certified than does MCI. Satellite carriers and value-added carriers are also cited, despite the fact that they were not treated at all in the 1971 *Specialized Carrier* decision in which the present Commission purports to find the imposition of certification conditions. In any event, they too have only limited transmission facilities already certified. The offering of new services by any of these carriers would require the filing of new tariffs which, under Section 203 of the

[41] For the last four quarters, AT&T has reported net income of more than one billion dollars per quarter. Last quarter, MCI had $876,000 in net income—less than one-tenth of one per cent of AT&T's income. As contrasted to AT&T's gross revenue of nearly $33 billion for the year ended December 31, 1976, the total revenues of *all* specialized and satellite carriers, as reported to the FCC for the same period, was less than $80 million—less than one-quarter of one percent of AT&T's revenues.

Communications Act, 47 U.S.C. § 203, could require ninety days' public notice before becoming effective. If there were sufficient reason to do so, the Commission has authority to suspend the effectiveness of such tariffs for an additional five months pursuant to Section 204 of the Communications Act, 47 U.S.C. § 204.

The FCC adds the rather curious argument that the decision below casts doubt upon the validity of the grants already made to MCI. The certifications previously made are, of course, already final and not subject to further review. At the time they were made, clearly the burden of proof with respect to the need for any service restrictions lay on the opponents of the grants. The opponents, which are highly experienced and sophisticated, failed to demonstrate that the public interest required any service restrictions. The Commission's expression of concern over MCI's grants ignores the fact that many of AT&T's lines were certified at a time prior to the introduction of "MTS" and "WATS" and received no further certification when those services were provided over them. Thus, if the decision below were deemed somehow to "cast doubt upon the validity of MCI's certifications in view of the lack of some affirmative determination of public interest with respect to Execunet service," it would cast just as much doubt concerning the validity of AT&T's certifications made prior to the development of direct distance dialing and WATS in view of the lack of affirmative determination of public interest with respect to provision of MTS and WATS service over those lines. Yet the Commission expressed no such doubt. The reason is very simply that it has been interpreting Section 214 one way for AT&T and would interpret it another way for MCI. Petitioners are making mutually contradictory arguments when they contend, on one hand, that MCI and similar carriers will in a short period of time grow to such huge proportions as to seriously challenge

AT&T's MTS service and, on the other hand, that MCI will lose all its present authorizations.

The FCC also complains that it will have to decide whether "to take a chance on open-ended grants or to limit the grants because the public interest affirmatively requires limits" (FCC Pet., p. 19). But this was exactly the question the Commission already decided for both AT&T and the specialized carriers in Docket No. 19117, *supra*. It concluded there that it should make it possible for domestic carriers as a general rule to offer new classes or subclasses of communications service over duly authorized facilities merely by filing appropriate tariff revisions, 39 FCC at 135.

This Court should note that AT&T for some time has been employing its substantial political influence to gain Congressional aid for its efforts to perpetuate its *de facto* monopoly and eliminate all competition. It has succeeded in having introduced proposed legislation to accomplish this objective. S. 3192, 94th Cong., 2nd Sess. (1976); H.R. 12323, 94th Cong., 2nd Sess. (1976); S. 530, 95th Cong., 1st Sess. (1977); H.R. 8, 95th Cong., 1st Sess. (1977). Among other things, AT&T's proposed legislation would prevent MCI and the other specialized carriers from providing the traditional forms of private line service to which it contends, in its instant petition, they should be limited. Indeed, AT&T's proposed legislation would limit the specialized carriers to services which cannot be provided by AT&T and would make it well nigh impossible for MCI to obtain authorization to do even that much. Both the Senate and House have held hearings on common carrier competition during the past year, and are considering a "basement to attic" revamping of the Communications Act.[42]

---

[42] *See* Press Release of Subcommittee on Communications of the House Interstate and Foreign Commerce Committee of October 11, 1976. In another press release dated November 16, 1977, the Chair-

Thus AT&T already has, even without review by this Court, two forums in which to expound its views on the alleged need for Governmental protection of its monopoly. In the one forum, AT&T is attempting to change the statutory standard for certification of competing carrier lines, and in the other it is being given every opportunity to meet the existing statutory standard. While such questions may well at some point in the future be ripe for review by this Court, they simply are not before the Court in the present case. The lower court specifically decided to defer such questions to the Commission as the appropriate initial forum in which the proponents of monopoly should put forth their views.

CONCLUSION

The Court should deny the writ of certiorari.

Respectfully submitted,

Of Counsel:

JOHN R. WORTHINGTON
1150 - 17th Street, N.W.
Washington, D.C. 20036
(202) 872-1600

October, 1977

MCI TELECOMMUNICATIONS CORPORATION
MICROWAVE COMMUNICATIONS, INC.
N-TRIPLE-C INC.

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES
RAYMOND C. FAY

HALEY, BADER & POTTS
1730 M Street, N.W.
Washington, D.C. 20036
(202) 331-0606

Their Attorneys

---

man of the Subcommittee on Communication, Lionel Van Deerlin, said "the issue of competition in the telephone industry will be thoroughly explored."

Nos. 77-420, 77-421, and 77-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE C INC., UNITED STATES OF AMERICA, DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105

HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Respondent Southern Pacific Communications Company

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

CITATIONS

CASES:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421, and 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE C INC., UNITED STATES OF AMERICA, DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App.2a-30a) [1] is not yet reported. The decision of the Federal

---

[1] "Pet.App." refers to "Petitioner's Appendix" of the Federal Communications Commission in No. 77-436.

Communications Commission (Pet.App.32a-168a) is reported at 60 F.C.C.2d 25 (1976).

JURISDICTION

The judgment of the Court of Appeals was entered on July 28, 1977 (Pet.App. 2a). Motions to stay the issuance of the mandate were granted by the Court of Appeals on August 22, 1977. The petitions in Nos. 77-420 and 77-421 were filed on September 16, 1977. The petition in No. 77-436 was filed on September 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether restrictions on the services which may be offered by a communications carrier may be implied, where the Federal Communications Commission has granted a certificate of public convenience and necessity to the carrier for the construction and operation of communications facilities under Section 214 of the Communications Act without express conditions, and without an affirmative finding under Section 214 that the public convenience and necessity require the imposition of terms and conditions on the certificate.

STATUTE INVOLVED

Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214, provides in pertinent part:

> Sec. 214. (a) No carrier shall undertake the construction of a new line or any extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the

> present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.
>
> (c) The Commission shall have power to issue such certificate as applied for, or refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require * * *.

STATEMENT

In 1969, the Federal Communications Commission granted applications by Microwave Communications, Inc. (MCI) to construct microwave facilities between Chicago and St. Louis "to offer to its subscribers a limited common carrier microwave radio service designed to meet the interoffice and interplant communications needs of small businesses".[2] No express conditions on the services which could be offered by MCI were stated in the certificate of public convenience and necessity issued to MCI at that time, or in later certificates. In 1971, the Commission granted applications by MCI to improve its facilities, observing that while MCI's services would meet the unfulfilled needs of small businesses, the Commission did not intend to confine the services which could be offered by MCI to customers having "only limited needs" for microwave services.[3]

---

[2] *Microwave Communications, Inc.*, 18 F.C.C.2d 953, 960-61 (1969), reconsideration denied, 21 F.C.C.2d 190, 194 (1970).

[3] *Microwave Communications, Inc.*, 27 F.C.C.2d 380, 383 (1971).

Following MCI's grant, numerous applications were filed by MCI and its affiliated companies, and by Southern Pacific Communications Company (SPCC) and others, to construct microwave facilities to provide specialized communications services in various parts of the country. After an extensive rule making proceeding in *Specialized Common Carrier Services,* the Commission concluded that a general policy in favor of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.[4] Thereafter, the Commission dismissed a rule making proceeding which would have required prior approval from the Commission before a carrier could offer new or revised services over its authorized facilities.[5]

Under tariff revisions which became effective on October 10, 1974, MCI offered a new "metered use" service over its authorized facilities which it called "Execunet". The American Telephone and Telegraph Company (AT&T) complained to the Commission that MCI was offering ordinary long distance telephone service, called Message Telecommunications Service (MTS), under the guise of Execunet, and that MCI was only authorized to provide private line services to its customers.

---

[4] *Specialized Common Carrier Services,* Docket No. 18920, 29 F.C.C.2d 870, 920 (1971), recon. denied, 31 F.C.C.2d 1106 (1971), affirmed, *Washington Utilities & Transportation Commission* v. *FCC,* 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC,* 423 U.S. 836 (1975).

[5] *Establishment of Rules Pertaining to the Authorization of New or Revised Classifications of Communications on Interstate or Foreign Common Carrier Facilities,* Docket No. 19117, 39 F.C.C.2d 131 (1973).

The Commission rejected the Execunet tariff as unlawful. The Commission ruled that "[o]ur discussion in the *Specialized Common Carrier* decision makes it quite clear that we intended and did open competition only in the limited portion of AT&T's and Western Union's business represented by private line services",[6] and that Execunet had many characteristics similar to those of MTS, and not to any actual private line service being offered by any carrier.[7]

In a unanimous decision here under review, the District of Columbia Circuit reversed.[8] The Court of Appeals rejected the Commission's position that there were implicit restrictions on the facilities authorizations of specialized carriers which limited them to providing only "private line" services. It noted that the Commission's interpretation represented a substantial departure from its prior administrative practice, when it wished to impose limitations, of writing restrictions into a carrier's certification or prescribing by rule the services to be rendered by a class of stations.[9]

The Court of Appeals held that under the express terms of Section 214(c) of the Communications Act, the Commission *may* attach restrictions, or require prior approval for services to be provided over authorized facilities, but only after it has made an affirm-

---

[6] *MCI Telecommunications Corp.,* 60 F.C.C.2d 25, 36 (1976), Pet. App. 32a, at 51a.

[7] Id., 60 F.C.C.2d at 42, Pet. App. at 61a.

[8] *MCI Telecommunications Corp.* v. *FCC,* No. 76-1635 (D.C. Cir. July 28, 1977), Pet. App. 2a.

[9] Id., Pet. App. at 16a-17a.

ative determination that "in its judgment the public convenience and necessity * * * require" terms and conditions to be attached to the certificate.[10] It ruled that the *Specialized Common Carrier* decision cannot reasonably be read to have made an affirmative determination restricting specialized carriers to private line services,[11] nor did the Commission make a determination at any time that the public interest would be served by creating or perpetuating an AT&T monopoly in interstate MTS to justify restrictions on specialized carrier competition.[12] Accordingly, it was held, since no prior approval for new services to be carried on authorized facilities was required, the Commission could not reject Execunet for not having been given prior approval.[13]

ARGUMENT

1. The Decision of the Court of Appeals Is Not in Conflict With Decisions of Other Courts of Appeals.

This case presents (1) a narrow question of statutory interpretation, i.e., whether Section 214 of the Communications Act permits the Commission to impose restrictions by implication on a carrier's certificate of public convenience and necessity without an affirmative finding that the restrictions are required, and (2) a narrow question of fact, i.e., whether the

[10] Note 8 supra, Pet. App. at 20a-24a.

[11] Id., Pet. App. at 28a.

[12] Id., Pet. App. at 29a-30a.

[13] Id., Pet. App. at 30a-31a.

Commission has done so by restricting specialized carriers to private line services.

This is the first court decision to address those issues. In holding that the implied restrictions may not be and have not been imposed, the Court of Appeals followed established precedents of Courts of Appeals in Commission cases that unless the regulatory agency has promulgated rules setting out limitations on services to be offered over the authorized facilities,[14] or has made an affirmative determination that the public convenience and necessity require the imposition of restrictions,[15] it may not interfere with the right of a carrier to initiate tariffs proposing new services or rates.[16]

There is no inconsistency with the series of recent decisions in which various Courts of Appeals have uniformly affirmed Commission decisions *extending* competition by new entrants in services and facilities heretofore offered only by the telephone companies.[17]

[14] *Press Wireless, Inc.*, 25 F.C.C. 1466 (1958), affirmed, *Press Wireless, Inc.* v. *FCC*, 105 U.S. App. D.C. 86, 264 F.2d 372 (1959).

[15] *Western Union Telegraph Co.* v. *FCC*, 541 F.2d 346, 355 (3rd Cir. 1976).

[16] *United Telegraph Workers, AFL-CIO* v. *FCC*, 141 U.S. App. D.C. 190, 436 F.2d 920 (1970); *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973). Cf. *Public Utilities Commission of California* v. *United States*, 356 F.2d 236 (9th Cir. 1966), cert. denied, 385 U.S. 816 (1966).

[17] *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC*, 423 U.S. 836 (1975); *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 797 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, No. 76-1675, 46 L.W. 3190 (Oct. 3, 1977); *Bell Telephone Co. of Penn-*

Not one Court in its holdings imposed any restrictions on the services and facilities which could be offered, but rather each Court rejected challenges by AT&T and others to competition in the specific area under inquiry.

Not one Court has ruled on the issues decided by the Court of Appeals below, whether restrictions can be or have been imposed by implication. In *Washington Utilities & Transportation Commission* v. *FCC* [18] cited by petitioners, the Ninth Circuit addressed different questions of procedure, i.e., whether the Commission's decision to permit the entry of new carriers in the specialized communications field was reasonable and supported by appropriate findings on the record, and subject to resolution by rule making. In *Bell Telephone Co. of Pennsylvania* v. *FCC*,[19] also cited by petitioners, the Third Circuit held that FX and CCSA were within the category of private line services clearly open to specialized carriers; it did not reach the question whether FX and CCSA could be furnished if they were not classified as private line.

The Commission suggests [20] that the District of Columbia's decision is inconsistent with the holding of the Third Circuit in *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, *AT&T* v. *FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975); *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *People of State of California* v. *FCC*, No. 75-2060 (D.C. Cir. June 20, 1977), petition for cert. pending, No. 77-406 (S.Ct.). Cf. *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977).

[18] Ibid.

[19] Ibid.

[20] FCC petition at 22.

sylvania that the Commission is the appropriate agency, by statute as well as by experience, to decide whether competition should be authorized and to what extent. To the contrary, the thrust of the decision of the Court of Appeals below is fully in conformity with the Third Circuit decision in ruling that the Commission should proceed to make that decision by an affirmative determination under its statutory mandate.

2. The Court of Appeals Decision Is A Proper Construction Of The Governing Statute.

The express command of Section 214(c) of the Communications Act [21] is that the Commission

> may attach to the issuance of a certificate such terms and conditions as in its judgment the public convenience and necessity may require.

It is unchallenged that the Commission has never made a specific affirmative determination under the statute that the public convenience and necessity require that specialized carriers be restricted to private line services. The Commission itself concedes [22] that the established telephone companies have a *de facto* monopoly in MTS, but it has never granted AT&T a *de jure* monopoly. No record has ever been made before the Commission to demonstrate *why* restrictions should be imposed on the specialized carriers in order to protect a monopoly which the Commission has never adjudicated to be proper.

[21] 47 U.S.C. 214(c).

[22] FCC petition at 18 fn. 34.

Significantly, none of the petitioners even adverts to the Commission's proceeding in Docket No. 19117,[23] although this was an important consideration in the decision by the Court of Appeals below.[24] As the Circuit Court points out, the Commission there recognized that in the absence of restrictions imposed under Section 214 in the facilities authorizations, carriers could offer any service which could physically be provided over their existing systems simply by filing a tariff. In the proceeding, the Commission clearly indicated its understanding of Section 214 as requiring explicit action in order to restrict a carrier to the service offerings it proposed when it sought authority to build, operate, or extend its communications lines. In terminating the proceeding, the Commission determined not to require its prior approval as a condition for any new service by a carrier over its authorized facilities.

3. A Review By This Court of the Decision of the Court of Appeals Would At Best Be Premature At This Time.

The ultimate issue remaining for decision by the Commission is one which it has never properly considered and resolved, viz., how much *further* does and should competition in communications services extend. The decision of the Court of Appeals below has not resolved this issue. It has made no ruling on the lawfulness of Execunet, or of the AT&T monopoly in MTS services, or on the proper dividing line, if any, which may be drawn between MTS and private line services, or between authorized and non-authorized

[23] Note 5 supra.

[24] Note 8 supra, Pet. App. at 16a-17a.

services. All these matters are left for the Commission to decide. Indeed, the Court of Appeals has expressly noted:[25]

> In so holding we have not had to consider, and have not considered, whether competition like that posed by Execunet is in the public interest. That will be the question for the Commission to decide should it elect to conduct these proceedings.

The compass of the Court of Appeals' ruling is thus too narrow to justify present review by this Court. The decision below only calls upon the Commission to conduct appropriate proceedings and to reach public interest determinations before it imposes restrictions upon the authorized facilities of specialized carriers. The Commission has not yet conducted these proceedings. For this Court to grant review at this time would affect the merits of the Commission's determination of the issues, before the Commission has had an opportunity to make an informed decision upon a proper administrative record. Until there has been a disciplined examination in an appropriate proceeding of the extent, if any, to which competition should be circumscribed under public interest standards, based upon a specific factual record and not unsupported assumptions and vague suppositions, the issues are not properly ripe for review by this Court.

4. There Are No Special and Important Reasons For A Review On Writ of Certiorari.

The petitions present no constitutional issue, or important question of federal law which should be set-

[25] Note 8 supra, Pet. App. at 30a.

tled by the Court at this time, or any occasion for an exercise of this Court's power of supervision. The matter before the Court of Appeals below involved a narrow question of statutory interpretation and administrative procedure, i.e., whether the agency below was required to make an affirmative determination (as the language of the statute explicitly dictates) that "in its judgment the public convenience and necessity * * * require" that terms and conditions be attached to an otherwise unqualified certificate of public convenience and necessity. The Court of Appeals specifically reached no resolution on the propriety of the tariff offering rejected by the the Commission. Rather, it remanded the question for decision by the Commission in an appropriate proceeding, whether restrictions should be imposed on the authorizations of specialized carriers which presently contain no express conditions. These are matters properly left for the Commission to consider, subject to judicial review under accepted judicial standards.

Contrary to the assertions of petitioners, the decision of the Court of Appeals will have only a minimal effect if permitted to become fully effective. The existing Section 214 authorizations of specialized carriers are restricted as to the lines or routes on which services may be offered, and the number of circuits on each route. Any expansion of MCI's presently limited authorizations will require Sectson 214 applications to the Commission subject to the Commission's processing procedures and its review of certification policies. Other specialized carriers such as SPCC are even more restricted, because they do not have tariffs in effect which permit them to offer Execunet-type service, and the tariffs which must be filed to offer this

or any new service are subject to the notice requirements and the suspension and investigation powers of the Commission before they can become effective. In addition, the specialized carriers with their limited facilities have continuing obligations to their present customers which do not permit them to change substantially the character of the services they are now offering on their authorized facilities.

Thus, the projections of injury by the telephone companies and their supporters are conjectual and unrealistic. Consistently over the years, they have claimed that competition would have a severe effect on telephone revenues and upon the funds available in the interstate revenues pool to support local exchange service. The Commission itself has never found any significant adverse effect on telephone company revenues or on the rates for basic telephone services as a result of competition.[26] In this regard, the Fourth Circuit has said:[27]

> [P]etitioners cannot create an economic impact with the volume of their jeremiad. Their claims of economic impact are refrains of assertions that the FCC has consistently found to be unsubstantiated by evidence, conclusory, and based on unrealistic assumptions about market behavior. [Citations.]

---

[26] *Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, Docket No. 20003, 61 F.C.C.2d 766, 776 (1976).

[27] *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036, 1055-56 (4th Cir. 1977), cert. denied, No. 76-1675, 46 L.W. 3190 (Oct. 3, 1977).

Conversely, if review is granted, the specialized carriers will continue to be deprived of the opportunity to offer services to the public which the Court of Appeals has ruled to be permissible under existing authorizations. They will thus continue to be sharply circumscribed in their ability to provide a viable operation and new and innovative services in competition with the established carriers.

In sum, no valid, much less urgent or compelling, reason has been shown for granting the writ. The alleged conflict between Circuits simply does not exist. In addition, as right as was the District of Columbia Circuit's interpretation of the applicable statute and the Commission's procedures, a review of that decision would at best be premature at this time, since the effect of that decision will depend upon its implementation by the Commission.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105

HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Respondent

Southern Pacific Communications Company

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel

October 17, 1977

Nos. 77-420, 77-421, and 77-436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE C INC., UNITED STATES OF AMERICA, DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

SUPPLEMENTAL BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105
HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Respondent Southern Pacific Communications Company

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Of Counsel

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421, and 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE C INC., UNITED STATES OF AMERICA, DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

SUPPLEMENTAL BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

This supplemental brief for the respondent Southern Pacific Communications Company in opposition is directed solely to the Memorandum of the United States stating that this Court should grant review because the decision of the court of appeals presents im-

portant issues as to services which may be offered by specialized carriers under certificates granted under Section 214 of the Communications Act (p. 6). The Memorandum acknowledges that the decision of the court of appeals rests upon substantial grounds, and reserves the position of the United States on the merits (ibid.).

1. The Memorandum appears to suggest (p. 6) that the United States supports the grant of review because it supported the Commission in the court below. However, the failure of the Government to anticipate the reasoning of the court below which it now concedes "rests upon substantial grounds" (ibid.) is hardly an adequate reason for review. The Government's evaluation of the lower court's decision, and its reservation of its position on the merits, constitute a recognition by the Government that the court of appeals may well have been correct in its decision on the merits. The limited resources of this Court should not be invoked in order to secure this Court's affirmance of lower court decisions.

2. The Memorandum fails completely to address the question why review by this Court *at this time* would be appropriate. The court of appeals has explicitly left to the Commission's decision in an appropriate proceeding (Pet. App. at 30a) the extent to which the certificates of specialized carriers should be limited. The Commission has not yet undertaken to conduct this proceeding. The Memorandum concedes (p. 5) that the Commission has not made the affirmative determination necessary under Section 214(c) of the Act that "the public convenience and necessity * * * require" that limitations be imposed upon specialized carrier certificates. Until the Commission makes this determination in an appropriate proceeding, review by this Court would be premature, and based on a wholly inadequate record on the public convenience and necessity issues. A grant of the petitions will delay substantially the resolution by the Commission of these important issues. A denial of the petitions will provide the best assurance that a proceeding will be initiated and conducted expeditiously by the Commission, and presented to this Court opportunely on an adequate record.

3. The Memorandum states that the Third[1] and Ninth[2] Circuits have viewed the Commission's *Specialized Common Carrier*[3] decision as involving only private line service (p. 5). Both courts affirmed Commission decisions *extending* competition by specialized carriers. Neither imposed any restrictions on the services and facilities which could be provided, or reached the question whether the public convenience and necessity require that limitations be imposed (see Southern Pacific Communications Company brief in opposition, pp. 7-9).

4. The issue is not whether the Commission and the carriers described the specialized carrier services in terms of private line services, but whether the Commis-

---

[1] *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), cert. denied, *AT&T* v. *FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975).

[2] *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC*, 423 U.S. 836 (1974).

[3] *Specialized Common Carrier Services*, Docket No. 18920, 29 F.C.C.2d 870 (1971), reconsideration denied, 31 F.C.C.2d 1106 (1971).

sion has effectively limited their offering to private line by making the affirmative determination required by statute that the public convenience and necessity so require. The Commission granted certificates of public convenience and necessity to specialized carriers for the lines or facilities "applied for" under Section 214(c) of the Communications Act. It is undisputed that it made no affirmative determination then or at any other time, as also provided under the same subsection of the Act, that "the public convenience and necessity * * * require" that limitations be placed upon their use of the lines or facilities.

Respectfully submitted,

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105

HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Respondent
Southern Pacific
Communications Company

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Of Counsel

November 29, 1977

No. 77-420

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY OF PETITIONER

THOMAS J. O'REILLY
1150 17th Street, N.W.
Washington, D.C. 20036

Counsel for United States Independent Telephone Association

Of Counsel:

CHADBOURNE, PARKE,
WHITESIDE & WOLFF
1150 17th Street, N.W.
Washington, D.C. 20036

November 3, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY OF PETITIONER

The United States Independent Telephone Association (USITA), Petitioner in No. 77-420, respectfully submits its reply to the Briefs in Opposition filed by MCI Telecommunications Corp. (MCI) and Southern Pacific Communications Co. (SPCC).

Both MCI and SPCC, extolling the virtues of the decision below, seek to persuade the Court that that decision was not only right but also that it involved but a narrow and limited issue, with the only result of the decision being a remand to the Federal Communi-

cations Commission (FCC) for further proceedings. MCI and SPCC completely miss the central point of this case and the basic reason why certiorari should be granted and the case set for plenary review.

I. THE DECISION BELOW HAS IMMEDIATE, UNLIMITED AND GRAVE FEDERAL IMPACT.

Underlying the horrendous practical consequences of the decision below, *one* of which is the spectre of years of FCC proceedings on remand,[1] is a Federal question of primary importance and universal applicability in the ongoing authorization of all common carrier communications facilities by the FCC. This is a question that FCC is powerless to address, much less answer and resolve, in proceedings on remand.

Simply stated, the basic question here is whether over many years the FCC has correctly read and applied its statute as authorizing it to grant certificates of public convenience and necessity "as applied for,"[2] with the affirmative grant defining the scope of the authorization, or whether in addition to its affirmative grant, the FCC must also measure each and every application submitted to it against the total universe of possible common carrier communication services, and then specifically and affirmatively find that the

[1] These involved and lengthy proceedings would be required only if the novel theory of Federal statutory construction devised by the court below is left standing. Moreover, the further proceedings that would be required in this case exemplify the regulatory morass into which, under the court's theory, the Commission must plunge in all certificate cases. If the Commission has correctly followed its statute and its precedents, however, its task has already been completed.

[2] Communications Act of 1934, Section 214 (47 U.S.C. 214); Pet. App. 6c.

public convenience and necessity does not require facilities and services not proposed by the applicant. It is this second and essentially negative non-statutory finding that is newly mandated by the decision below.

Truly, the situation in the particular MCI case at bar is exacerbated by the repeated and emphatic representations by the MCI applicant that it sought authorization to provide only "specialized" private line services and had no intention whatever of engaging in the furnishing of plain old telephone service, with the FCC granting MCI precisely the authority it sought. The fundamental issue here, however, is far broader than the case of MCI, SPCC, or of any other particular applicant, and can and should be decided by the Court without regard to the presence or identity of the private parties to this case. Indeed the case goes directly and immediately to the very heart of the Commission's execution of its common carrier regulatory duties and the nature and scope of its statutorily required public interest, convenience and necessity findings and conclusions.

II. THE DECISION BELOW CONFLICTS WITH THE STATUTE AND OTHER DECISIONS.

A. The Certificate Statute And Decisions.

By its statute (specifically Section 214 of the Communications Act),[3] if the Commission finds and concludes "that the present or future public convenience and necessity require or will require"[4] the construction of new facilities, it may issue its certificate authorizing that construction. And as the court below

[3] *Ibid.*

[4] *Ibid.*

acknowledged, ". . . it is analytically impossible to determine the need for a new facility without considering the services to be provided over it."[5] To aid it in making its public convenience and necessity findings and conclusions, the Commission has promulgated rules which require that every application for a certificate of public convenience and necessity must contain showings, *inter alia,* of the public need for the proposed facilities, of economic justification for the proposed project, of how existing communications services are being furnished and reasons why existing facilities are inadequate, and of proposed tariff charges and regulations.[6] Thus is the FCC informed of precisely what authority is sought by an applicant.

In a broad yet detailed rulemaking proceeding,[7] the Commission evaluated, in the light of its statute and its rules, hundreds of "specialized" certificate applications pending before it. The Commission concluded, as a matter of general policy, that there was a public need for the new specialized communications services proposed; that new entry into the specialized private

[5] *Slip op.* at 23; Pet. App. 23a.

[6] FCC Rules and Regulations, Sec. 63.01; 47 C.F.R. § 63.01. The decision below would make a mockery of these FCC Rules, for if it is permitted to stand, an applicant could propose a new communications service, obtain Commission authorization, find its market estimates for the new service entirely too optimistic, and then proceed to try its luck with any other service, thus converting its authorized facility to a purpose never considered by FCC and for which initial authorization would not have been given. The possibility for error, abuse, or misrepresentation under these circumstances is limitless.

[7] *Specialized Common Carrier Services,* FCC Docket No. 18920, 24 FCC 2d 318 (1970); 29 FCC 2d 870 (1971); 31 FCC 2d 1106 (1971).

line communications market would produce specific public benefits, and would have little adverse effect on existing carriers; and that grant of the pending specialized carrier applications would serve the public interest, convenience and necessity.[8]

The nature and scope of this general specialized private line policy, pursuant to which thousands of grants (including the MCI grants at issue below) were in fact made by the Commission, were fully understood by the Commission itself, by the new applicants, by those existing carriers who opposed the policy, by State utility regulatory bodies, and by reviewing courts.[9] Indeed, even the *MCI* court, in the opinion below, did not quarrel or take issue with the nature and scope of the Commission's affirmative *Specialized Carrier* policy.[10]

B. The Error In The Decision Below.

What the *MCI* court did, however, was to first devise its own novel theory of "implicit restrictions,"[11] a theory it gratuitously imputed to FCC. Having found this theory inadequate the *MCI* court then proceeded

[8] *Id.*

[9] See, *e.g., Specialized Common Carrier Services, supra; aff'd, Washington Utilities and Transportation Com.* v. *FCC,* 513 F.2d 1142 (9th Cir.) *cert. denied,* 423 U.S. 836 (1975); *United States Transmission Systems, Inc.,* 48 FCC 2d 859 (1974); *aff'd, AT&T* v. *FCC,* 539 F.2d 767 (D.C. Cir. 1976); *Bell System Tariff Offerings,* 46 FCC 2d 413 (1974); *aff'd, Bell Telephone Co. of Pa.* v. *FCC,* 503 F.2d 1250 (3d Cir. 1974), *cert. denied,* 422 U.S. 1026, *reh. denied,* 423 U.S. 886 (1975); *Specialized Common Carriers,* 44 FCC 2d 467 (1973) 50 FCC 2d 416 (1974).

[10] *Slip op.* at 26; Pet. App. 26a.

[11] *Slip op.* at 16; Pet. App. 16a.

to judicially amend the Commission's statute and its rules to impose on the Commission a second public interest finding requirement, *i.e.*, the making in all application cases of "an affirmative determination that the 'public convenience and necessity may require'[60] a restriction on a facility authorization limiting a carrier to provision solely of those services proposed in its Section 214(a) application. * * *[60] 47 U.S.C. § 214(c) (1970)."[12]

In so holding, the court below committed a double fault. First, the court failed to acknowledge the adequacy of the basic affirmative public interest finding required of the Commission by its Section 214(a), absent which no carrier may construct any line for any purpose, and the Commission's specific authority "to issue such certificate *as applied for*."[13] Second, the court misconstrued the statutory provision that the Commission "*may* attach to the issuance of the certificate such terms and conditions *as in its judgment* the public convenience and necessity may require"[14] to mean that the Commission *must* attach terms and conditions to a certificate, without regard to whether in its judgment terms and conditions are necessary, and if it does not do so, its grants are unrestricted.[15]

---

[12] *Slip op.* at 26; Pet. App. at 26a.

[13] Section 214(c), 47 U.S.C. 214(c); Pet. App. 7c; emphasis supplied.

[14] *Ibid.*

[15] The apparent assumptions by the court below that the phrase "terms and conditions" equals "restrictions and limitations," and that the scope of an authorization can be limited only by the imposition of terms and conditions, are unwarranted grammatically or legally. Surely the Commission may grant a certificate "as applied for" without adding "but not as not applied for."

In these faults lies the fatal flaw in the decision below, a flaw which if not corrected here and now by the Court will have immediate and devastating effect on the processing of every wire and radio application[16] now or in the future submitted to the Commission. Were the decision below allowed to stand, each and every application for certificate or license must then be measured not only against the statutory standard, *i.e.*, whether the facilities and services proposed are required by the public convenience and necessity, but each and every application must also be the subject of a second and further judicially mandated new inquiry into whatever public interest considerations might be involved in the provision of other communications services for which the applicant has not sought authorization or even has expressly disclaimed any intention of offering.

Clearly, then, it matters not whether the applicant's name is MCI, SPCC or John Doe; and it matters not whether the communications service is called Execunet, SPRINT, or by another name. The court below has ordered an immediate and fundamental change in the FCC's consideration and disposition of all certificate applications. Even clearer is the fact that the fundamental and significant Federal question arising out of the decision below is not a limited issue that can be resolved by the FCC in proceedings on remand, for the FCC can neither ignore nor modify the court's directive. Thus the question presents an issue unlimited in scope that can only be resolved on plenary review by the Court.

---

[16] The Section 214 common carrier provisions are mirrored in the Section 308 language in respect of radio licenses.

III. CONCLUSION.

For these reasons, together with those advanced in its Petition, USITA respectfully prays that the writ issue.

Respectfully submitted,

THOMAS J. O'REILLY
1150 17th Street, N.W.
Washington, D.C. 20036

Counsel for United States Independent Telephone Association

Of Counsel:

CHADBOURNE, PARKE,
WHITESIDE & WOLFF
1150 17th Street, N.W.
Washington, D.C. 20036

No. 77-436

In the Supreme Court of the United States

OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

ROBERT R. BRUCE,
General Counsel,
DANIEL M. ARMSTRONG,
Associate General Counsel,
JOHN E. INGLE,
Counsel,
Federal Communications Commission,
Washington, D.C. 20554,
(202)632-7112.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER
v.
MCI TELECOMMUNICATIONS CORP., ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

The Federal Communications Commission supplements its petition and reply, pursuant to Rule 24(5), to invite the Court's attention to a recent decision of still another circuit construing the Commission's Specialized Common Carrier Services policy in a manner that conflicts with the decision below in this case. The Second Circuit (Kaufman, C.J.), in a summary of the "position and function of licensed communications carriers" in this country, stated:

> Recently, the FCC has encouraged entry of new carriers into the domestic communications field. In the early 1970's, the Commission began licensing various Domestic Satellite Common Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") to offer, in competition with AT&T, private line service to governmental and large private commercial users. *See,*

e.g., Specialized Common Carrier Services, 29 F.C.C. 2d 870 (1971) * * *.

Western Union International, Inc. v. *FCC,* Nos. 77-4183, 77-4184, 77-4191, 2d Circuit, decided December 21, 1977 (footnote omitted).

The quoted language was not the holding of the case, nor was it an essential premise to the decision. In that sense, it does not pose the direct conflict that the Third and Ninth Circuit decisions posed. (See Pet., pp. 8–9, 13–15; Reply, pp. 2–3.) However, it does confront the Court with a third circuit that has construed Specialized Common Carrier Services authorizations as limited to private line services—in direct conflict with the holding of the District of Columbia Circuit that the authorizations are not limited.

Respectfully submitted,

ROBERT R. BRUCE,
General Counsel,
DANIEL M. ARMSTRONG,
Associate General Counsel,
JOHN E. INGLE,
Counsel,
Federal Communications Commission,
1919 M Street, N.W.,
Washington, D.C. 20554,
(202) 632-7112.

U.S. GOVERNMENT PRINTING OFFICE: 1977

No. 77-421

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL MEMORANDUM OF PETITIONER

Of Counsel:

F. MARK GARLINGHOUSE
195 Broadway
New York, N.Y. 10007

MICHAEL BOUDIN
PAUL J. BERMAN
888 Sixteenth Street, N.W.
Washington, D.C. 20006

ALFRED C. PARTOLL
EDWARD L. FRIEDMAN
195 Broadway
New York, New York 10007

Attorneys for American Telephone and Telegraph Company

December 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

SUPPLEMENTAL MEMORANDUM OF PETITIONER

Pursuant to Supreme Court Rule 24(5), this supplemental memorandum is filed by petitioner AT&T to bring to the Court's attention a pertinent decision just released by the United States Court of Appeals for the Second Circuit. *Western Union Int'l* v. *FCC,* Nos. 77-4183, *et al.,* Dec. 21, 1977. The decision, which is reprinted as an appendix to this memorandum, describes the basic structure of the industry in pertinent part as follows (p. 5a, below):

> *"The Domestics.* Recently, the FCC has encouraged the entry of new carriers into the domestic

communications field. In the early 1970's the Commission began licensing various Domestic Satellite Common Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") to offer, in competition with AT&T, private line service[4] to governmental and large private commercial users. *See, e.g., Specialized Common Carrier Services,* 29 F.C.C.2d 870 (1971); *Domestic Communications Satellite Facilities,* 35 F.C.C.2d 844 (1972).

[4] "'Private line service' provides the large-scale telephone customer with full-time private circuits for the transmission of communications between specified locations. This offers the customer continuous communication without requiring the carrier to establish a new connection for each call or message."

The decision of the District of Columbia Circuit in this case is thus now inconsistent with the common understanding of three other circuits—the Second Circuit as well as the Third and Ninth Circuits—as to the scope of authorized specialized carrier competition.* This conflict between the circuits, which is itself ample warrant for certiorari, is only one of the several independent reasons why plenary review is warranted. See AT&T Pet. 12-18, 25-31.

* *Washington Utils. & Transp. Comm'n* v. *FCC,* 513 F.2d 1142, 1155 (9th Cir.), *cert. denied,* 423 U.S. 836 (1975); *Bell Telephone Company of Pennsylvania* v. *FCC,* 503 F.2d 1250, 1260-61 (3rd Cir. 1974), *cert. denied,* 422 U.S. 1026 (1975). See also *AT&T* v. *FCC,* 539 F.2d 767, 773-74 (D.C. Cir. 1976).

CONCLUSION

For the reasons stated above and in AT&T's petition, certiorari should be granted.

Respectfully submitted,

Of Counsel:

F. MARK GARLINGHOUSE
195 Broadway
New York, N.Y. 10007

MICHAEL BOUDIN
PAUL J. BERMAN
888 Sixteenth Street, N.W.
Washington, D.C. 20006

ALFRED C. PARTOLL
EDWARD L. FRIEDMAN
195 Broadway
New York, New York 10007

Attorneys for American Telephone and Telegraph Company

December 1977

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEPTEMBER TERM, 1977

Nos. 564, 565, 566

(Argued December 7, 1977, Decided December 21, 1977)

DOCKET Nos. 77-4183, 77-4184, 77-4191

WESTERN UNION INTERNATIONAL, INC., RCA Global COMMUNICATIONS, INC., and ITT WORLD COMMUNICATIONS INC., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, United States of AMERICA, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *Respondents,*

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and TRT TELECOMMUNICATIONS CORPORATION, *Intervenors.*

Before: KAUFMAN, *Chief Judge,* MESKILL, *Circuit Judge,* and BARTELS, District Judge.*

Petition for review of Decision and Orders of the Federal Communications Commission, requiring the American Telephone and Telegraph Company to eliminate a discrimination by which it charged the international record car-

---

* Of the United States District Court for the Eastern District of New York, sitting by designation.

riers lower rates under contracts than it charged for "like" services provided to other common carriers under tariff.

Denied.

Alvin K. Hellerstein, New York, New York (Alan Kolod and Stroock & Stroock & Lavan, of counsel; Robert E. Conn, Marc N. Epstein of Western Union International Inc., New York, N.Y., of counsel), *for Petitioner Western Union International, Inc.*

H. Richard Schumacher, New York, New York (John A. Shutkin and Cahill Gordon & Reindell, of counsel; Frances J. DeRosa, Charles M. Lehrhaupt of RCA Global Communications, Inc., New York, N.Y., of counsel), *for Petitioner RCA Global Communications, Inc.*

Grant S. Lewis, New York, New York (John S. Kinzey and LeBoeuf, Lamb, Leiby & MacRae, of counsel; Howard A. White, Joseph J. Jacobs, Randall B. Lowe of ITT World Communications Inc., New York, N.Y., of counsel), *for Petitioner ITT World Communications Inc.*

Jack David Smith, Washington, D.C. (Federal Communications Commission, Robert R. Bruce, General Counsel, Daniel M. Armstrong, Associate General Counsel; and U.S. Department of Justice, Washington, D.C. John H. Shenfield, Assistant Attorney General, Barry Grossman, Andrea Limmer, Attorneys of counsel) *for Respondents Federal Communications Commission and United States of America.*

James S. Golden, Bedminster, New Jersey (Edgar Mayfield, Robert E. Boone, Bedminster, New Jersey, and Alfred C. Patroll, Gerald E. Murray, New York, N.Y., of counsel), *for Respondent-Intervenor American Telephone and Telegraph Company.*

Roderick A. Mette, Washington, D.C., *for Intervenor TRT Telecommunications Corporation.*

KAUFMAN, *Chief Judge:*

Just over a century ago, Alexander Graham Bell marked the beginning of a new era with the invention of the telephone. Little did he know that successive generations would treat his "creation" as but the simplest building block in a communications system of extraordinary complexity. We are asked, on this appeal, to unravel some of these intricacies in applying the mandate of § 202(a) of the Communications Act that there be no unjust discrimination in the rates charged for "like" communications services. Several international record carriers ("IRCs"), namely companies carrying messages overseas, petition for review of the Federal Communications Commission's ("FCC") determination that the facilities they lease from the American Telephone and Telegraph Company ("AT&T") are "like" those used by specialized domestic carriers. Pursuant to its finding of likeness, the FCC ordered AT&T to eliminate the existing disparity in rates governing the domestic and international carriers. As a result, AT&T filed tariffs raising the charges paid by the IRCs to parity with the cost to the domestics. We find the FCC's decision to be fully supported by substantial evidence in the record and, accordingly, deny the petition.

I.

To fully understand the factual and legal questions presented by this appeal, a familiarity with the position and function of licensed communications carriers is essential. The facts, which at first blush seem to require the expertise of a DeForest or a Kettering, can upon reflection be readily disentangled.

The International Record Carriers. Petitioners Western Union International, Inc. ("WUI"), RCA Global Communications, Inc. ("RCA"), ITT World Communications Inc. ("ITT"), and intervenor TRT Telecommunications Corp. ("TRT") are international record carriers. As such, they

are empowered by the FCC to provide communications services[1] between the United States and points overseas. Pursuant to their licenses, the IRCs are permitted to transmit and receive messages from and between five so-called "gateway cities."[2] The services of the IRCs cannot extend beyond this rather limited network.

The operating procedure of the IRCs is relatively uncomplicated. Once a message is received in a gateway city, it is then transmitted overseas either through the medium of submarine cables or international satellites. The cables are jointly owned and operated by the IRCs, AT&T, and various foreign governments; the satellites are owned by INTELSTAT, an international consortium from whose American representative the IRCs merely lease "space". To link up to a cable or satellite system, however, the message must first be transmitted to, respectively, "cable heads" or "earth stations." These terminals are jointly owned and used by AT&T and the IRCs.

The IRCs thus have an ownership interest in many of the international transmission facilities. Yet, they are completely dependent on the circuits owned by AT&T which connect one gateway operating center to another ("intercity facilities") and which join each of the five centers to cable heads and earth stations ("entrance facilities"). Pursuant to private contractual agreement, the IRCs lease these "interconnection facilities" from AT&T.[3]

---

[1] The IRCs provide telex, telegrams, facsimile, data transmissions, private lines for alternate voice-data traffic and other record-communications services of a sophisticated nature.

[2] New York, San Francisco, Washington, Miami, and New Orleans.

[3] The IRCs are not pleased with this arrangement, and have, for almost a decade, sought to purchase an ownership interest, known as an indefeasible right of use ("IRU"), from AT&T. The FCC, however, has refused to order AT&T to relinquish its control over the circuits.

The Domestics. Recently, the FCC has encouraged the entry of new carriers into the domestic communications field. In the early 1970's the Commission began licensing various Domestic Satellite Common Carriers ("DSCCs") and Specialized Common Carriers ("SCCs") to offer, in competition with AT&T, private line service[4] to governmental and large private commercial users. *See, e.g., Specialized Common Carrier Services,* 29 F.C.C.2d 870 (1971); *Domestic Communications Satellite Facilities,* 35 F.C.C.2d 844 (1972).

In spite of their competitive position vis-a-vis AT&T, the so-called "domestics" often found it necessary to use that company's landline interconnection facilities. They soon discovered, however, that AT&T was restricting their access to its circuits and was charging discriminatory rates for the provision of services. In 1974, after receiving numerous complaints, the FCC ordered AT&T to provide the domestics with interconnection facilities and to promulgate standardized charges. *Bell System Tariff Offerings,* 46 F.C.C.2d 413 (1974), *aff'd sub nom. Bell Telephone Co. of Pennsylvania v. FCC,* 503 F. 2d 1250 (3d Cir.), *cert. denied,* 422 U.S. 1026 (1975). AT&T subsequently filed tariffs governing the use of interconnection facilities, and the FCC indicated that it would study the propriety of these rates in light of the widespread concern among the domestics over them. *AT&T Offer of Facilities for Use by Other Common Carriers,* 47 F.C.C.2d 660 (1974). To obviate the need for a full-scale FCC investigation, the FCC and AT&T agreed that AT&T would attempt to settle its differences with the various carriers through negotiation. Because some of the proposed tariffs would have affected

---

[4] "Private line service" provides the large-scale telephone customer with full-time private circuits for the transmission of communications between specified locations. This offers the customer continuous communication without requiring the carrier to establish a new connection for each call or message.

aspects of the IRC operation,[5] the international carriers also participated in these discussions.

In due course, a "Settlement Agreement" between the parties was reached, and they requested the FCC to accept their resolution of the dispute. While the Settlement Agreement applied to all of the interconnection facilities used by the domestics, it explicitly excluded from its scope those used by the IRCs, and justified that limitation by reference to the alleged "unique needs" of the international communications network. This exclusion was made at the insistence of the IRCs, presumably because the then existing contractual rates were lower than the rates proposed in the Settlement Agreement.

The FCC Investigation. Because the terms embodied by the Settlement Agreement would lower the rates paid by the domestics for the use of AT&T's facilities and were, accordingly, in the public interest, the FCC accepted the accord on May 7, 1975 "without necessarily approving it." *AT&T Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C.2d 727 (1975). The Commission did, however, take issue with the Agreement's representation that the IRC facilities were unique:

> The Settlement Agreement points out, however, that, notwithstanding the furnishing of similar facilities to other common carriers pursuant to tariffs, entrance and intercity facilities furnished by AT&T to the IRCs continue to be furnished pursuant to contract. In apparent support, the parties noted "the unique needs of the [IRCs] between gateway cities and for entrance channels from cable heads and earth stations to those carriers' central offices in metropolitan areas."

[5] At issue was a New York Telephone tariff involving certain telegraph-grade facilities made available to the IRCs. *See ITT World Communications Inc.* v. *New York Telephone Co.*, 381 F. Supp. 113 (S.D.N.Y. 1974).

> We still believe that a substantial question exists as to whether we should order AT&T to provide these facilities pursuant to filed tariffs rather than pursuant to contracts, and we will take appropriate action on this matter in a separate order.

52 F.C.C.2d at 735.

Carrying out its stated purpose to investigate whether the interconnection facilities should be governed by tariff, the FCC, pursuant to a "separate order" issued that same day, established a restricted rule-making proceeding, 47 C.F.R. § 1.1201. *Interconnection Facilities Provided to the International Record Carriers,* 52 F.C.C.2d 1014 (1975). The Commission left no doubt that the motivation behind the inquiry was the alleged disparate treatment of the IRCs and the domestic carriers:

> It appears to us that there is no significant difference between the interconnection facilities provided to the IRCs and those provided under tariff to the specialized common carriers including domestic satellite common carriers.

52 F.C.C.2d at 1014.

The IRCs and AT&T [6] filed comments in connection with the rule-making proceeding. They uniformly stressed the fact that the existing contractual arrangement was satisfactory, and several expressed doubts about the FCC's authority to abridge contracts between carriers. None of those commenting referred to any explicit differences in physical facilities, functions, or costs of the two systems. The only "distinction" raised by the IRCs was their tautological assertion that the facilities used by them were

[6] While AT&T noted that the existing arrangement appeared satisfactory, it also expressed its willingness to file tariffs if the FCC found it to be in the public interest.

"part" of an international communications network, and therefore distinguishable from the "domestic" circuits employed by the domestic carriers. RCA characterized this fact as a difference "between the circumstances" under which the two sets of companies obtained interconnection facilities.[7] WUI, seeking to appear more specific, noted that the "subject contracts are an inherent part of the long-standing submarine cable and satellite earth station consortia of the IRCs and AT&T, totally distinct from the domestic telecommunications industry." ITT similarly described the facilities as "nothing more nor less than U.S. extensions of [the] overseas cables."

On March 23, 1977, the Commission issued its order. It found that the facilities provided to the IRCs were "essentially identical" to those provided to the domestics and that the disparate rate structure was accordingly discriminatory under § 202(a) of the Communications Act. *Interconnection Facilities Provided to the International Record Carriers*, 63 F.C.C.2d 761 (1977). In its decision, the Commission expressed particular concern that the difference in the rate structures for the two systems might well have resulted in the subsidization by domestic customers of the international communications network. The Commission thus ordered AT&T to eliminate this disparity by filing appropriate tariffs, although it explicitly noted that it was expressing "no opinion" with regard to how AT&T might wish to do so. The FCC did comment, however, that if AT&T offered its facilities to all carriers—domestic and international—on identical terms, then the requirement of 47 C.F.R. § 61.38, that rates be justified by underlying costs, would be waived.

The IRCs immediately moved for reconsideration of the FCC decision. While their petitions were pending, AT&T

[7] A similar comment was voiced by TRT, which noted that the two sets of facilities were supplied "under significantly different circumstances."

sought clarification of its obligation under the order. In particular, the company was having difficulty devising a nondiscriminatory tariff to cover several peculiar communications "systems" aptly characterized by the FCC as "quirks". These included the Washington to Moscow "Hotline", a Florida-Cuba cable circuit serving foreign diplomats in Havana, the Department of Defense's AUTOVON network, and a facility used by the National Aeronautics and Space Administration for the tracking and monitoring of space satellites. In an effort to resolve these difficulties, four meetings were held in the spring of 1977 between AT&T and the FCC. The merits of the FCC order were never discussed. Approximately one month after the last of these meetings, the Commission supplied all interested parties with a summary of the discussions that took place.

On May 26, AT&T filed tariffs for the IRC interconnection circuits, choosing to eliminate the discrimination by raising the rates charged the IRCs to parity with those charged the domestics. Initially, this new cost schedule was to become effective in late August but was subsequently deferred to October 28. This delay permitted the FCC to hold a public meeting on September 7 to settle some of the outstanding issues affecting the tariffs. At that gathering an AT&T representative, responding to IRC comments that the tariffs should reflect cost differences between the IRC and domestic facilities, noted that "[e]ntrance and transiting facilities [for IRC's] are physically and essentially the same as those provided to domestic[s]. We cannot justify a lower charge to the IRC's."[8]

The difficulties between the IRCs and AT&T remained unresolved following the meeting and, on October 25, 1977, the FCC filed its order denying the still pending application for reconsideration of its earlier decision. *Intercon-*

[8] Minutes, dated September 9, 1977, of public meeting held at FCC offices on September 7.

nection Facilities Provided to the International Record Carriers. FCC 77-694 (Reconsideration Order). The Commission based its determination not only on the initial comments provided by the IRCs, but also on their submissions supporting the request for reconsideration. The FCC, in examining this "voluminous administrative record",[9] found little that would alter its earlier conclusions. In submitting their petition for reconsideration, the IRCs had made several specific claims of differences between the two systems. They had noted special geographical limitations on the locations of gateway cities, earth stations and cable heads and further observed that the IRC circuits were engineered to meet special international operating requirements. In a lengthy opinion, the FCC rejected each of these contentions. It noted, for example, that geographic limitations have never been deemed sufficient as a distinguishing factors, for if it were, virtually any local service would become "unique". Regarding the international operating requirements the Commission observed that many domestic circuits were engineered to meet such specifications, and, in any event, the alleged differences were not substantial enough to make the two types of services "unlike".[10]

---

[9] The FCC noted that it had before it: its original decision and the accompanying record; the IRCs' petitions for reconsideration of that decision; the IRCs' petitions against AT&T's proposed tariffs; all other miscellaneous letters and comments filed by the IRCs; AT&T's responsive pleading to the IRC petitions to reject the tariffs; the summary of the meetings between the FCC and AT&T; and the summary of the September 7, 1977 public meeting. Reconsideration Order, ¶ 43.

[10] In the reconsideration order, the FCC also examined the tariff filed by AT&T, noting that the IRCs had failed to demonstrate why the tariff should be rejected or suspended. The Commission found that its waiver of cost justification for the tariff was appropriate, since absent a waiver, the discrimination might well have continued while cost figures were developed. *See National Association of Motor Bus Owners* v. *FCC*, 460 F.2d 561, 568 (2d Cir. 1972).

While the IRCs protested that the finding of "likeness" was based on an inadequate record, and demanded an evidentiary hearing, the Commission felt that nothing would be gained by extending an already exhaustive investigation.

II.

The petitioners attempt to gloss over the language of § 202(a) of the Communications Act, 47 U.S.C. § 202(a), which forbids "unjust or unreasonable discrimination in charges" in connection with the provision of "like" communication services. By its terms, the statute embodies an absolute obligation to prevent such discrimination in the public interest regardless of the needs of particular users or other policy considerations. *American Trucking Associations, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967). The issue before us simply is whether the FCC's finding of "likeness" with regard to the domestic and IRC facilities is supported by substantial evidence. We have no difficulty in finding that it is.

In May 1975, when the FCC first commenced its rulemaking proceeding, it noted that there were no "significant differences" between the domestic and IRC interconnection facilities. In fact, this similarity was readily apparent from tariff and contractual provisions governing, respectively, domestic and international communications. The facilities for both employed "voice-grade" circuits possessing similar bandwidths. They performed essentially the same functions:[11] the entrance facilities interconnected

---

[11] "Functional similarity" has been used in the past as a criterion for determining likeness for section 202(a) purposes. *See, e.g., American Trucking Associations, Inc.* v. *FCC*, 377 F.2d 121 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 943 (1967); *Investigation into the Lawfulness of Tariff FCC No. 267, Offering a Dataphone Digital Service Between Five Cities*, 62 F.C.C. 2d 774, 796-97 (1977). The Commission has always make "likeness" determinations on a case-by-case basis, although it indicates that it will soon attempt to develop general standards. Reconsideration Order, ¶ 12 n. 11.

either earth stations,[12] microwave terminals, or cable heads to operating offices, while the intercity facilities in both instances permitted communications between and among operating offices in different cities. Given this functional similarity, the FCC had good cause to suspect that there was little justification for the large difference in the rates charged for the two facilities.

In the ensuing two years—while the FCC came to a final decision and studied the requests for reconsideration—the IRCs were given and took advantage of numerous opportunities to distinguish the two sets of circuits. Their arguments rested on the facile and conclusory observation that the IRC interconnections were "part" of the international system, and thus "unique," although some went so far as to acknowledge that the two sets of facilities, in terms of their physical and functional characteristics, might well be similar.[13] Throughout the entire period, no significant differences between the two systems came to light. In fact, AT&T, which built and operates both systems, observed that the facilities are "physically and essentially the same."[14]

We fail to see what additional facts would have been elicited in hearings given that these proceedings have already become unduly extended with repeated opportunities to supply information and air the problem. Admittedly, there has been no evidentiary hearing. The type of

[12] The IRCs argue that the domestic carriers "normally" use their own microwave circuits to link their operating centers to earth stations. Whether or not that is the case—for no evidence is given in support of that claim—some domestics do use AT&T entrance facilities, as is clearly demonstrated by the Settlement Agreement. *AT&T Offer of Facilities for Use by Other Common Carriers*, 52 F.C.C. 2d 727, 727-28 (1975).

[13] RCA noted, for example, that "in some cases there may well be no significant difference between [domestic] facilities generally and IRC facilities."

[14] Minutes, *supra* note 8.

hearing required however, must depend on the circumstances of each case. *RCA Global Communications, Inc.* v. *FCC*, 559 F.2d 881 (2d Cir. 1977). The IRCs have failed to demonstrate that the extensive notice and comment procedures afforded them did not provide ample opportunity to explore the alleged unique characteristics of the IRC interconnection circuits.

Our determination is buttressed by the fact that once the FCC demonstrated a basis for its determination of likeness, the burden shifted to the IRCs to disprove the discrimination in its favor. *See Trailways of New England, Inc.* v. *CAB*, 412 F.2d 926, 932 n.13 (1st Cir. 1969). Afforded the chance on repeated occasions, they have failed to do so. In fact, they have to this day made only one argument to justify the discrimination: a difference in the costs of the two systems. Since that issue was never raised in the proceedings before the Commission, however, it cannot be brought up at this juncture of the case for the first time.[15] *Gross* v. *FCC*, 480 F.2d 1288, 1290-91 n.5 (2d Cir. 1973). Moreover, the limited evidence on this issue—the statement of the AT&T representative at the September 7, 1977 meeting—suggests the absence of any disparities in this regard.

In any event, the FCC is about to conduct a hearing into the cost justification for the tariff rates proposed under the Settlement Agreement, and the IRCs will be able to participate fully in that inquiry. Should there be a finding that those rates are unduly high, the IRCs would be able to recover overcharges plus interest. 47 U.S.C. §§ 208-09. Any cost differences between the two systems would hopefully also be brought to light in these hearings.

[15] The IRCs raised the issue of cost differences only in connection with the validity of the tariff filed by AT&T, which of course involves a question that is plainly separable from the finding of likeness. And concerning the tariff, the Commission properly decided to waive cost justification so as to move expeditiously in eliminating the discrimination.

III.

The petitioners also charge that the FCC proceedings were irreparably tainted by four *ex parte* meetings that took place between officials of the Commission and AT&T representatives for the purpose of discussing the so-called "quirks", to which we have previously referred. They argue that the FCC investigation was designated as a "restricted rule-making proceding", and under the Commission's own rules, FCC personnel were prohibited from entertaining *ex parte* presentations. 47 C.F.R. § 1.1225(b). We find, however, that these meetings were not prohibited under the FCC rules, for the AT&T representatives' involvement did not constitute "presentations". As defined in 47 C.F.R. § 1.1201(f), "presentations" are only "communication[s] going to the merits or outcome of any aspect of a restricted proceeding." 47 C.F.R. § 1.1201(f). The discussions with AT&T were intended solely to help that company implement the FCC order in specific, troublesome areas. Nothing said in these meetings was intended to affect the order itself in any manner, or to influence the Commission regarding the petition for reconsideration. Indeed, on the one occasion when AT&T raised the issue of possible cost differences between the IRC and domestic circuits, an FCC official cautioned that the subject could not be discussed, and that AT&T should file a petition for reconsideration if it wished to challenge the order itself.

In any event, little prejudice to the IRCs, if any, could have arisen from the meetings. The scope of discussion was confined to several minor idiosyncracies in the international circuits, affecting in no way the great bulk of the circuits covered by the FCC's order. In addition, the IRCs have been in possession of a summary of the meetings since June 24, 1977, and were explicitly invited to comment on this matter by the FCC.[16] Under these circumstances,

[16] RCA was the only IRC to respond directly to the FCC request. WUI also commented on the *ex parte* meetings, but did so only in a petition to reject the AT&T tariff. It contended that the meetings "exacerbated" the FCC's alleged preconceptions regarding the merits of this controversy.

the claim of prejudice to the IRCs is totally without merit. *Compare Home Box Office, Inc.* v. *FCC*, No. 75-1280, slip op. (D.C. Cir. March 25, 1977), *cert. denied*, 46 U.S.L.W. 3190 (October 3, 1977).

IV.

Finally, the IRCs attempt to characterize the FCC's order as one that "abrogates" the private contractual agreements existing between them and AT&T and, as such, goes beyond the Commission's statutory authority. Admittedly, the Commission does not have any express authority to countermand intercarrier contractual agreements. *See Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). And while the Commission contends that this power should be implied from the statutory framework, to do so would require a finding that the proposed action is in the public interest. 63 F.C.C. 2d at 765-66. That finding is absent here.

Whatever the precise scope of the FCC's power, it is evident that the Commission has not abrogated any intercarrier contracts. Nothing in its order required that AT&T alter the rates it charged the IRCs. To the contrary, the order explicitly noted that it was merely requiring AT&T to eliminate the discrimination between the domestic and IRC circuits. It was thus open to AT&T to alter the rates it was charging the domestics by bringing them down to the fee levels charged in the IRC contracts. The FCC order further specified that so long as the rates for the two systems were equalized—by whatever means—the Commission would not require cost justification. Petitioners' contention that AT&T was forced to raise the IRC rates due to a lack of cost figures is therefore incorrect.[17]

[17] Comments by two of the petitioners indicate that the choice offered AT&T was a real one. During the September 7 meeting

As must be obvious to the interested parties, we have carefully reviewed this substantial record. We find no merit in any of the IRCs' other contentions and therefore deny the petition.

---

between AT&T and the IRCs, RCA Vice-President Asher H. Ende noted that "[i]n Docket 20452 [the] FCC did not require filing of this new tariff, but only that AT&T eliminate unlawful discrimination . . . . The Commission left room for a compromise." And an attorney for WUI, Marc N. Epstein, noted in a letter to AT&T dated September 26, 1977, that "the Commission did not explicitly require the exact tariffs AT&T filed. It required only the elimination of an alleged unlawful discrimination. Therefore, the [FCC] Staff took the position that there may be room to compromise or narrow the issues. In light of the foregoing, AT&T's attempts to place the onus of its unwillingnes to discuss settlement upon the Commission is misplaced."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEFS

Of Counsel:

JOHN R. WORTHINGTON
1150 - 17th Street, N.W.
Washington, D.C. 20036
(202) 872-1600

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES
JOHN M. PELKEY
HALEY, BADER & POTTS
1730 M Street, N.W.
Washington, D.C. 20036
(202) 331-0606

January, 1978

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421 and 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, AND FEDERAL COMMUNICATIONS COMMISSION,
Petitioners

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., AND N-TRIPLE-C INC.,
Respondents

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEFS

In supplemental briefs, filed December 30, 1977, American Telephone and Telegraph Company (AT&T) and the Federal Communications Commission (FCC) brought to the Court's attention several prefatory sentences in a decision issued by the Court of Appeals for the Second Circuit on December 21, 1977. *Western Union International, Inc.* v. *FCC*, Nos. 77-4183, 77-4184 and 77-4191. The purpose of these filings was to bolster an obviously weak assertion that there exists conflict among various

of the Circuit Courts. The present filings merely highlight the substantive paucity of the claim of conflict.

As the FCC correctly observed, the "quoted language was not the holding of the case, nor was it an essential premise to the decision."

What AT&T and the FCC failed to mention was that the existence of the present controversy was not even disclosed to the Second Circuit, nor did AT&T or the Commission even advise the Second Circuit of the existence of the District of Columbia Circuit's *Execunet* decision, despite the fact that the Second Circuit case was briefed months after the D.C. Circuit issued its decision. In fact, none of the parties to the Second Circuit appeal (who included AT&T, the FCC and four international record carriers) informed the Second Circuit of the existence of the Execunet dispute and its resolution by the D.C. Circuit. Clearly none of the parties to that case had any incentive to do so. The Second Circuit apparently accepted an uncontested description of what the *Specialized Carrier* decision was all about and used it, in passing, as a minor element in its description of the background of the case before it. The matters presented to the Second Circuit were far removed from the ones involved here, with the result that the court had no occasion to focus upon the questions presented in the *Execunet* case.[1] The appeals by the international record carriers involved completely different issues—and apparently far simpler ones than were decided by the D.C. Circuit.[2]

---

[1] The Second Circuit was addressing the quite different question of whether the FCC had properly ordered AT&T to eliminate a discrimination by which it charged the international record carriers lower rates under contracts than it charged for similar services provided to other common carriers under tariff.

[2] The Second Circuit was able to issue its decision only two weeks after oral argument in that case. Indeed, the FCC's brief to the Second Circuit was filed on December 1, 1977—only twenty days before the decision was issued.

It does a grave disservice to the Second Circuit to imply, before this Court, that it has taken a position at odds with a sister court regarding a controversy about which parties on one side of this case failed to inform it—and one which was clearly not at issue before the Second Circuit in any way. The FCC seeks to compound the matter when it represents to this Court that the Second Circuit Court of Appeals "has construed Specialized Common Carrier Services authorizations as limited to private line services" and that this places it "in direct conflict with the holding of the District of Columbia Circuit that the authorizations are not limited." As the FCC well knows, the "authorizations" of the specialized common carriers were not before the Second Circuit and the latter undertook no analysis of the *Specialized Carrier* decision, merely citing it *once* in the passage quoted here by petitioners.

The weakness of the Petitioners' entire case is sharply illuminated by their effort to make capital of an inaccurate, wholly innocent, recital in a decision of another court in a quite different setting. It is quite clear that the Second Circuit, like the Ninth and Third Circuits, in the cases earlier cited by petitioners, has not addressed the questions resolved by the D.C. Circuit in this case and is therefore not in conflict with the decision below.

CONCLUSION

For the reasons stated above and in MCI's Brief for the Respondents in Opposition, the Petition for Certiorari should be denied.

Respectfully submitted,

Of Counsel:

JOHN R. WORTHINGTON
1150 - 17th Street, N.W.
Washington, D.C. 20036
(202) 872-1600

January, 1978

MCI TELECOMMUNICATIONS CORPORATION
MICROWAVE COMMUNICATIONS, INC.
N-TRIPLE-C INC.

MICHAEL H. BADER
KENNETH A. COX
WILLIAM J. BYRNES
JOHN M. PELKEY

HALEY, BADER & POTTS
1730 M Street, N.W.
Washington, D.C. 20036
(202) 331-0606

Their Attorneys

Nos. 77-420, 77-421, and 77-436

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-420

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

No. 77-421

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

No. 77-436

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The question presented by the three petitions for a writ of certiorari in this case raises two issues. The first is whether under Section 214 of the Communications Act of 1934, 48 Stat. 1075, as amended, 47 U.S.C. 214, a certificate of public convenience and necessity to construct and operate a channel of communication granted by the Federal Communications Commission to a communications common carrier "as applied for,"

without any other express condition, is restricted to the general category of service the carrier proposed in support of its request for a certificate. If the answer is yes, then the second issue is whether the certificate authority granted by the Commission to specialized communications common carriers is limited to "private line" service.

1. Respondent MCI Telecommunications Corporation and its affiliates ("MCI") hold certificates from the Federal Communications Commission under Section 214,[1] authorizing them to construct and operate a transcontinental point-to-point microwave system. The certificates were issued under a Commission policy statement that provided general guidelines for disposing of some 1713 microwave applications submitted by 33 applicants, almost all of whom were seeking authority to

---

[1]Section 214(a) provides that "the term 'line' means any channel of communication established by the use of appropriate equipment [other than the inter-connection of two or more existing channels]." Section 214(a) further provides that "[n]o carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended lines * * *." However, under the proviso to Section 214(a), no "certificate or other authorization from the Commission [is required] for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of the service provided."

Section 214(c) provides, "[t]he Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

offer some kind of "private line" or business data communication service, as distinguished from public telephone service.[2] *Specialized Common Carrier Services*, 29 F.C.C. 2d 870, 871, affirmed *sub nom. Washington Utilities and Transportation Commission* v. *Federal Communications Commission*, 513 F. 2d 1142 (C.A. 9), certiorari denied, 423 U.S. 836.

In September 1974, MCI filed a tariff with the Commission proposing to offer its subscribers a service called "Execunet." Under this service, any MCI subscriber can connect with any telephone in a distant city served by MCI simply by dialing the local MCI number, an access code connecting him with MCI's point-to-point intercity microwave link, and the telephone number in the distant city. The American Telephone and Telegraph Company ("AT&T") objected that the Execunet tariff amounted to an offer of long distance message telephone service, not "private line" service. The Commission ultimately held in a lengthy opinion that Execunet is not a private line service of the kind specialized common carriers are authorized to provide. *MCI Telecommunications Corp.*, 60 F.C.C. 2d 25 (App. 32a-104a).[3]

On petition for review by MCI, the court of appeals reversed (App. 2a-31a). The court held that under Section 214(a), the Commision may not impose restrictions on the services offered by carriers in tariffs filed with the

---

[2]MCI and other certificated specialized common carriers also were granted radio licenses under Section 308 of the Act (47 U.S.C. 308). The Commission is empowered to classify radio stations and to prescribe the nature of the service to be rendered by each class of station and each station within any class. 47 U.S.C. (and Supp. V) 303.

[3]"App." refers to the appendix filed in No. 77-436 by the Federal Communications Commission.

Commission that are within the scope of their authorizations. It then held that authorizations may be restricted only by express conditions imposed under Section 214(c) after the Commission has found that such restrictions are required by the public convenience and necessity. Since the specialized common carrier decision did not constitute such a determination, the court reasoned, the Commission must accept MCI tariff filings that offer new services over its existing facilities, including Execunet and any other services of which its facilities are physically capable (*ibid.*).

2. The petitioners contend, *inter alia*, that the decision of the court of appeals misconstrues Section 214. They reason that Section 214(a) authorizes the grant of certificates for new communications channels ("lines") only if the Commission finds that the public interest, convenience and necessity so require. Section 214(c) permits the Commission to issue the certificate "as applied for." Since, as the court of appeals recognized, "it is analytically impossible to determine the need for a new facility without considering the services to be provided over it" (App. 22a), petitioners argue that the term "as applied for" should be construed to include the service justification presented by the carrier in support of its request for a certificate. Otherwise, it is contended, the carriers would be able to offer services that the Commission has not affirmatively determined to be required by the public convenience and necessity because the need for services other than those proposed by the carrier in support of its application has never been placed before the Commission. Such a result, petitioners claim, in effect recognizes a doctrine of authorization by inadvertence inconsistent with Section 214's requirement that the Commission affirmatively determine the public

convenience and necessity. Cf. *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86. Under this view of the court's decision, the Commission could limit a grant only by expressly finding that the public convenience and necessity requires that the certificate granted be restricted to the services proposed by the carrier in its application.

We do not understand the Commission to contend that in its *Specialized Common Carrier* decision it in fact made an affirmative determination under Section 214(c) that the public interest, convenience and necessity required that specialized common carrier certificates be restricted to "private line" service. It apparently assumed that such an affirmative determination was unnecessary because it believed the proceedings to be limited to the general category of service presented by the applications it considered in the *Specialized Common Carrier* decision, and that certificates granted under that decision were granted "as applied for" under Section 214(c).[4] The Commission (App. 49a-55a), and the Third and Ninth Circuits, have viewed that decision as involving only

---

[4]In its report and order in Docket No. 19117, *In the Matter of the Establishment of Rules Pertaining to the Authorization of New or Revised Classifications*, 39 F.C.C. 2d 131, the Commission declined to adopt rules that would have expressly required an affirmative determination that any proposed new service was required by the public interest before any carrier could offer that service over its existing facilities. The Commission concluded that such a requirement, originally proposed to protect new specialized communications services (27 F.C.C. 2d 36), was unnecessary because the *Specialized Common Carrier* decision assured development of competitive specialized service. The Commission also declared that all express restrictions in existing domestic authorizations for specialized service under Section 214 were null and void. Specialized carriers may thus offer new services simply by filing a tariff within the scope of their basic authorizations.

"private line service." *Washington Utilities and Transportation Commission* v. *Federal Communications Commission, supra,* 513 F. 2d at 1159; *Bell Telephone Company of Pennsylvania* v. *Federal Communications Commission,* 503 F. 2d 1250, 1260-1261 (C.A. 3), certiorari denied, 422 U.S. 1026.

2. The United States as statutory respondent (28 U.S.C. 2344) supported the Commission in the court below. It believes that the decision of the court of appeals presents important issues as to the kind of determination the Commission must make in issuing certificates under Section 214 of the Act, and as to the scope of outstanding certificates held by specialized common carriers. Nevertheless, the decision of the court of appeals rests upon substantial grounds. Therefore, although the United States agrees with the Commission that this Court should grant review, the United States will reconsider its position on the merits in the light of the court of appeals' reasoning if the petitions are granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

NOVEMBER 1977.

DOJ-1977-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421, 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-C INC.,
DATA TRANSMISSION COMPANY (DATRAN),
and SOUTHERN PACIFIC COMMUNICATIONS COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE STATE OF MICHIGAN AND THE MICHIGAN PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

RONALD D. EASTMAN, *Special Attorney General for the State of Michigan*

Of Counsel:

VERNER, LIIPFERT, BERNHARD and McPHERSON
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7400

THOMAS J. KELLER
1660 L Street, N.W.
Washington, D.C. 20036

Attorneys for the State of Michigan and the Michigan Public Service Commission

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421, 77-436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-C INC., DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The State of Michigan and the Michigan Public Service Commission (hereafter "Michigan") hereby respectfully move this Court for leave to file the attached brief *amicus curiae* in support of the petitions for certiorari in the above-captioned case.

At the outset, Michigan wishes to point out that the attached brief is sponsored by the undersigned Special Attorney General for the State of Michigan and has been explicitly authorized by the Attorney General for the state. In this regard, Supreme Court Rule 42(4), 28 U.S.C., exempts *amicus curiae* briefs filed by "a state . . . sponsored by its attorney general" from the consent requirements of Supreme Court Rule 42(2). Accordingly, Michigan believes that its brief falls within the ambit of this exemption, and that it would be appropriate for the Court to permit the filing of the brief pursuant to Rule 42(4) without consent having been obtained from the parties to the proceedings below. Nevertheless, out of an abundance of caution and in the event the Court may construe its rule narrowly so as to exclude the brief from the exemption, Michigan is filing the instant motion for leave to file.[1]

The Michigan Public Service Commission (MPSC) is an agency of the State of Michigan charged by statute with responsibilities, *inter alia*, to protect the people of the State of Michigan in matters relating to the cost and quality of telephone service. MPSC has jurisdiction "to regulate all public utilities in the state" with respect to "all rates, fares, fees, charges, services, rules, conditions of service and all other matters" pertaining to such utilities, including all regulatory matters pertaining to telephone companies.[2] MPSC is empowered to fix rates for intrastate telephone service that are "reasonable and just," and is responsible

[1] Michigan has sought consent to the filing of its brief from the parties to the proceedings below. Consent has been obtained from counsel for petitioners, Federal Communications Commission, American Telephone and Telegraph Company, and United States Independent Telephone Association. Consent was not obtained from the respondents.

[2] Mich. Comp. Laws §460.6 (Mich. Stat. Ann. §22.13(b) (Callaghan 1970)).

for protecting consumers against charges that are "unjust and unreasonable."[3] Public utilities in Michigan, including telephone companies, are entitled by law to earn a reasonable return on the value of their investment.[4]

The outcome of this case will significantly affect the manner in which MPSC discharges its statutory responsibilities to the public. The decision below will have a substantial impact on the utilities regulated by MPSC and on customers of telephone service in Michigan whose interest MPSC is charged with protecting. In Michigan and in other states, common facilities are used in the provision of both interstate and intrastate telephone service. Common plant and service costs must be allocated between intrastate and interstate services to reflect the relative use of the common facilities in providing one service or the other. Under the jurisdiction conferred by Section 410 of the Communications Act of 1934, 47 U.S.C. §410, the FCC and representatives of state regulatory commissions have adopted jurisdictional formulas for the allocation of costs between intrastate and interstate services as a function of the relative usage of such services by telephone subscribers.[5]

In this regard, revenues from interstate long distance telephone service are used to defray costs of local service. Permitting carriers other than telephone companies to offer interstate long distance telephone service in competition with telephone companies would significantly reduce the contribution to the cost of local telephone service now

[3] Mich. Comp. Laws §§484.103, 11702, 6691 (Mich. Stat. Ann. §22.1443 (Callaghan 1970)).

[4] *Mich. Bell Telephone Co. v. Michigan Public Service Comm.*, 332 Mich. 7, 50 N.W.2d 826 (1952).

[5] *In the Matter of Prescription of Procedures for Separating and Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*, 26 F.C.C. 2d 248 (1970). See also *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S. Ct. 65, 75 L.Ed. 255 (1930).

provided by long distance revenues. This, in turn, will result in the need for substantial increases in rates for local telephone service.

Given the essential and intimate relationship between interstate and intrastate telephone services and between Federal and State regulatory procedures pursuant to 47 U.S.C. §410, Michigan respectfully submits that its participation in these proceedings is necessary to insure proper representation of the interests of both the utilities and the public in the State of Michigan.

WHEREFORE, it is respectfully requested that this Court grant leave for the filing of the attached brief *amicus curiae* by the State of Michigan and the Michigan Public Service Commission in this case.

Dated this 19th day of October, 1977

Of Counsel:

VERNER, LIIPFERT, BERNHARD
AND MCPHERSON
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7400

RONALD D. EASTMAN, *Special Attorney General for the State of Michigan*

THOMAS J. KELLER
1660 L Street, N.W.
Washington, D.C. 20036

Attorneys for the State of Michigan and the Michigan Public Service Commission

INDEX

CITATIONS

CASES AND ADMINISTRATIVE PROCEEDINGS

STATUTES AND REGULATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-420, 77-421, 77, 436

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
and FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, MICROWAVE COMMUNICATIONS, INC., and N-TRIPLE-C INC., DATA TRANSMISSION COMPANY (DATRAN), and SOUTHERN PACIFIC COMMUNICATIONS COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF THE STATE OF MICHIGAN AND THE MICHIGAN PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The State of Michigan and the Michigan Public Service Commission (hereafter "Michigan") hereby submit, in accordance with Rule 42 of the Rules of this Court, the following brief *amicus curiae* in support of the Petitions for

Writ of Certiorari filed by the Federal Communications Commission (FCC), American Telephone and Telegraph Company (AT&T), and the United States Independent Telephone Association (USITA). This brief is sponsored by the undersigned Special Attorney General for the State of Michigan and has been explicitly authorized by the Attorney General of the State.

Michigan believes that the Petitions filed earlier in this case and the brief *amicus curiae* filed by National Association of Regulatory Utility Commissioners (NARUC), which Michigan generally supports, set forth compelling reasons why a writ of certiorari should issue. Accordingly, Michigan will not repeat all the reasons that might be advanced in support of a writ, but rather will focus on those which are of particular interest to the State and which it believes are most compelling.

OPINIONS BELOW

The opinion in the Court of Appeals is not yet reported; the decision of the Federal Communications Commission is reported at 60 F.C.C.2d 25. Appendices A and B to the Petition for Writ of Certiorari filed by the Federal Communications Commission (No. 77-436) set out each opinion.[1]

JURISDICTION

The Court of Appeals entered its decision on July 28, 1977. This Court has jurisdiction by virtue of 28 U.S.C. §1254(1).

[1] Michigan will refer to portions of those opinions by citing to the Appendices filed by the Federal Communications Commission (FCC App.).

QUESTION PRESENTED

The question presented to the Court is: Whether the Court of Appeals for the District of Columbia Circuit erred when it held that specialized common carriers such as MCI have authority to provide ordinary long distance telephone service notwithstanding that (1) the FCC had never made the requisite finding that the public interest would be fostered by allowing specialized carriers to provide ordinary long distance telephone service, and (2) the specialized carriers had never requested authority pursuant to 47 U.S.C. §214 to provide ordinary long distance telephone service.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§151-609, appear in Appendix D of the Petition for Certiorari filed by the Federal Communications Commission.

STATEMENT OF THE CASE

A. The FCC's Execunet Decision

For purposes of this case, the interstate services provided by communications common carriers can be divided into two categories: (1) ordinary long distance telephone service (MTS) and (2) private line service. Although MTS historically has been provided on a *de facto* monopoly basis by telephone companies, both telephone companies and specialized common carriers have provided private line service on a competitive basis with FCC and judicial approval.[2]

[2] A "private line service" is one "whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time." 47 C.F.R. §21.2 (1976).

The FCC granted the first specialized carrier certificate in 1969 to MCI authorizing the provision of private line services between Chicago and St. Louis. *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969), 21 F.C.C.2d 190 (1970). Confronted with a host of similar applications from MCI and other potential specialized carriers, the Commission inaugurated a rulemaking proceeding to address general policy questions common to all applicants, rather than holding a separate hearing on each application. *Specialized Common Carrier Services* (Docket No. 18920), 24 F.C.C.2d 318 (1970). In proposing the rulemaking, the FCC noted that the applicants proposed to provide only "specialized private line services," 24 F.C.C.2d at 324, and thus limited its inquiry to the public interest ramifications of competition in those services, *id.* at 335-38. The FCC ultimately concluded that competition in the limited market for private line services would benefit the public and would have negligible adverse impact on the telephone company carriers. *Specialized Common Carrier Services*, 29 F.C.C.2d 870, 31 F.C.C.2d 1106 (1971). In affirming that decision, the Ninth Circuit interpreted the FCC's policy as sanctioning competition in the field of private line services, but not MTS. *Washington Utilities & Transp. Comm. v. FCC*, 513 F.2d 1142, 1155 (9th Cir. 1975), *cert. denied*, 423 U.S. 826 (1975).

On September 11, 1974, MCI filed tariff revisions with the FCC which contemplated the provision of "metered use service" as an additional part of its private line service offering. AT&T challenged the tariff on the grounds that the proposed service, known as "Execunet," was indistinguishable from ordinary long distance telephone service, and hence was beyond the scope of MCI's limited authorization in the *Specialized Carrier* decision.[3]

[3] FCC App. B at 99a-104a.

Following an investigation of the Execunet tariff, the FCC released its decision on July 13, 1976, confirming its *Specialized Carrier* decision and reiterating that MCI and other specialized carriers had been authorized only to provide private line service.[4] On the basis of unchallenged descriptions of the service, the Commission found that Execunet had "all the essential characteristics of MTS" and "does not have the essential characteristics of private line service * * *"[5] The FCC held unanimously that the proposed service was beyond MCI's limited authority.

B. The Opinion Below

The Court of Appeals reversed, holding that MCI had been authorized to provide not only MTS service, but also any services except those precluded by restrictions the FCC had affirmatively decided were required by "the public convenience and necessity."[6] In its opinion, the court below did not deny that Execunet was a form of MTS service, and it conceded that the FCC had never determined that the provision of MTS service by specialized carriers would benefit the public interest.[7]

INTEREST OF AMICUS CURIAE

The Michigan Public Service Commission (MPSC) is an agency of the State of Michigan charged by statute with responsibilities, *inter alia*, to protect the people of Michigan in matters relating to the cost and quality of telephone service. MPSC has jurisdiction "to regulate all public utilities in the state" with respect to "all rates, fares,

[4] *Id.* at 51a.
[5] *Id.* at 64a.
[6] FCC App. A at 24a.
[7] FCC App. A at 29a, 31a.

fees, charges, services, rules, conditions of service and all other matters pertaining to such utilities," including all regulatory matters pertaining to telephone companies.[8] MPSC is empowered to fix rates for intrastate telephone service that are "reasonable and just," and is responsible for protecting consumers against charges that are "unjust and unreasonable."[9] Public utilities in Michigan, including telephone companies, are entitled by law to earn a reasonable return on the value of their investment.[10]

In Michigan as in other states, common facilities are used in providing both interstate and intrastate telephone service, and common plant and service costs are allocated between the two types of service. Under the jurisdiction conferred by Section 410 of the Communications Act of 1934, 47 U.S.C. §410, the FCC and representatives of state regulatory commissions have adopted jurisdictional formulas for the allocation of costs between intrastate and interstate services as a function of the relative usage of such services by telephone subscribers.[11] Pursuant to these formulas, interstate MTS revenues defray the costs of local telephone service; accordingly, a reduction in the relative quantity of interstate service offered by telephone companies would decrease the amount of common costs

[8] Mich. Comp. Laws §460.6 (Mich. Stat. Ann. §22.13(b) (Callaghan 1970)).

[9] Mich. Comp. Laws §§484.103, 11702, 6691 (Mich. Stat. Ann. §22.1443 (Callaghan 1970)).

[10] *Mich. Bell Telephone Co. v. Michigan Public Service Comm.*, 332 Mich. 7, 50 N.W.2d 826 (1952).

[11] *In the Matter of Prescription of Procedures for Separating Allocating Plant Investment, Operating Expenses, Taxes and Reserves Between the Intrastate and the Interstate Operations of Telephone Companies*, 26 F.C.C.3d 248 (1970). See also *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255 (1930).

recouped in interstate rates and increase costs which would have to be recouped in intrastate rates.[12] Opening the field of MTS service to competition would have the effect of significantly reducing the contribution to the cost of local telephone service that MTS revenues historically have provided. This, in turn, would result in the need for substantial increases in rates for local telephone service. Michigan believes the decision below, if allowed to stand, will have precisely this effect.

Michigan emphasizes that it takes no position at this time on the question whether, on a nationwide basis, the provision of interstate MTS service by specialized common carriers is in the public interest. That determination is properly to be made by the FCC or the Congress, taking into account the views of all interested parties, including state regulatory commissions. Michigan's present concern is that the decision below, *i.e.*, that specialized carriers are authorized to provide interstate MTS service without the FCC having made the proper public interest determination to that effect, will have far-reaching and possibly unintended consequences — consequences that ought to be addressed in a considered fashion before, not after, they occur.

ARGUMENT

There are two reasons why a writ of certiorari is warranted: (1) the decision below raises important questions of statutory construction in that it ignores the plain meaning of 47 U.S.C. §214(c) and is contrary to this Court's interpretation of the Communications Act with respect to the authorization of competitive services in the communications field; and (2) if allowed to stand, the decision

[12] *See, e.g., Washington Utilities and Transp. Comm. v. FCC, supra.*

will seriously disrupt the Federal/State regulatory framework governing communications services.[13]

A. The Opinion Below Improperly Construes The Communications Act of 1934

The court below has construed Section 214 of the Communications Act of 1934, 47 U.S.C. §214, to mean that every FCC authorization under that section is open-ended and unlimited, irrespective of the scope of authority requested by the carrier, unless the FCC makes an "affirmative determination" that restrictions on the authorization are in the public interest.[14] In so holding, the court ignored the plain language of Section 214(c) of the Communications Act.

Section 214(c) sets forth various powers of the Commission with respect to applications for certificates. Specifically, it empowers the Commission to "issue such certificate *as applied for*, or to refuse to issue it, or to issue it for a portion or portions of a line . . . ," and further provides that the Commission "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."[15] Focusing on the last quoted portion, the court below held that the Commission "cannot impose any restrictions unless it has affirmatively determined that 'the

[13] Michigan recognizes that there are other reasons why a writ should issue as set forth fully in the Petitions filed earlier in this case, particularly the conflict between the opinion below and decisions of the Ninth and Third Circuits in *Washington Utilities & Transp. Comm. v. FCC*, *supra*, and *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). Michigan supports the position that this conflict in the circuits warrants review.

[14] FCC App. A at 20a, 21a.

[15] 47 U.S.C. §214(c), *emphasis added*.

public convenience and necessity [so] require.' "[16] The court thus ignored the statute's prescription that the FCC grant certificates "as applied for" and erroneously converted the authority to condition those certificates into a definition of the scope of authority granted — a definition that is inconsistent with the requirements of the first clause.

Even though it acknowledged that a service like Execunet was not before the FCC in the *Specialized Carrier* case, the court below held that the *Specialized Carrier* decision authorized Execunet service because of the absence of explicit restrictions against providing MTS service. It ignored the fact that the certificates "applied for" in the *Specialized Carrier* case covered only private line services. The court could come to its conclusion that the specialized carriers' facility authorizations are open-ended and unrestricted[17] only by disregarding the plain meaning of the first clause of Section 214(c).

Further, the holding below does not comport with this Court's construction of the Communications Act in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 73 S. Ct. 998, 97 L. Ed. 1470 (1953), to the effect that the Act requires the FCC to consider, prior to authorizing a carrier to provide a new service, whether competition in that service will have a beneficial effect on the public interest. [18] The court below admitted that it had not itself considered "whether competition like that posed by Execunet is in the public interest," and conceded that this was a question yet to be decided by the FCC.[19] Yet notwithstanding the conceded

[16] FCC App. A at 26a.

[17] *Id.* at 31a.

[18] The principle of *FCC v. RCA Communications, Inc.* was held to apply to carrier applications filed pursuant to Section 214 in *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974).

[19] FCC App. A at 33a.

absence of the required analysis of public benefit, the court nevertheless found that MCI had authority to offer Execunet service in competition with MTS.

The improper construction of Section 214(c) by the court below and its disregard of the principles of *FCC v. RCA Communications, supra,* warrant the issuance of a writ of certiorari.

B. The Opinion Below Will Disrupt the Federal/State Regulatory Framework

The decision below will undermine the foundation of Federal and State telephone rate regulation by disrupting the long-established and carefully considered cost allocation mechanisms for interstate and intrastate services.[20] It is virtually certain that MCI and other specialized carriers, which previously were thought to be limited by the FCC to private line services, will seek to capitalize on the decision below. The consequent diversion of MTS traffic from telephone companies to the specialized carriers will result in the loss of revenues that now help defray the costs of local telephone service. This loss will in turn create a need for corresponding increases in local telephone rates in Michigan and other states.

To say that the FCC may, in accordance with the opinion below, initiate further proceedings and impose restrictions on the specialized carriers' authorizations is not adequate. Such proceedings would take years to complete, and in the interim specialized carriers would be free to inaugurate any and all manner of services pursuant to the open-ended authority conferred by the court below with no assessment of the public interest consequences having been made by the FCC.

[20] See n. 11, *supra.*

In this regard, MPSC notes again that it takes no position here on the question whether or not, on a nationwide basis, the public interest would be served by competition in long distance telephone service. It may be that the public interest would be advanced by such a change. But if so, Congress or the FCC should make that determination in a considered and deliberate manner, one that affords Federal and State regulators an opportunity to fashion in advance appropriate regulatory procedures for dealing with its impact.

Such a fundamental and far-reaching change should not occur solely as a result of a single decision of one circuit that is at odds with the plain meaning of the Communications Act and contrary to principles established by this Court.

CONCLUSION

For the foregoing reasons, the State of Michigan and the Michigan Public Service Commission respectfully urge this Court to grant the Petitions for Writ of Certiorari.

Respectfully submitted,

RONALD D. EASTMAN, *Special Attorney General for the State of Michigan*

Of Counsel:

VERNER, LIIPFERT, BERNHARD and McPHERSON
1660 L Street, N.W.
Washington, D.C. 20036
(202) 452-7400

THOMAS J. KELLER
1660 L Street, N.W.
Washington, D.C. 20036

Attorneys for the State of Michigan and the Michigan Public Service Commission